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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

J.S.G. BOGGS,
Petitioner,
v.
ROBERT E. RUBIN, BRIAN L. STAFFORD, and JANET RENO,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The First Amendment requires that any prior restraint of expression take place under procedural safeguards that protect against the dangers of a censorship system, including a uniformly imposed requirement that the government bear the burden of obtaining prompt judicial review Do these safeguards apply to expressive materials regardless of their subject matter, or are they limited to alleged obscenity, as the Court of Appeals held?

2. May a District Court declare expressive material to be forfeited to the government as "contraband" where the forfeited property was either not shown to the court at all or was shown to the court *ex parte*?

3. Where works of fine art forfeited as "contraband" are not in the District Court record, and the Court of Appeals denies the owner's motion to supplement the record before it to include these materials, has the Court of Appeals fulfilled its duty, present in First Amendment cases, to "make an independent examination of the whole record" (*New York Times Co. v. Sullivan,* 376 U.S. 254, 284-86 (1964))?

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J.S.G. Boggs, by his undersigned counsel, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.[1]

OPINIONS OF OTHER COURTS

The majority and dissenting opinions of the Court of Appeals (App. 1a) are reported at 161 F.3d 37. The opinion of the District Court (App. 17a) is reported at 987 F. Supp. 1.

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[1] This petition is not filed on behalf of any corporation. *See* S. Ct. R. 29.6.

JURISDICTION

The Court of Appeals entered judgment on November 6, 1998 and denied a timely filed petition for rehearing on February 3, 1999. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The texts of the First and Fifth Amendments, and of 18 U.S.C. §§ 474 and 504, are reproduced in the appendix.

STATEMENT

Petitioner, J.S.G. Boggs, is an internationally respected artist. His work graces the permanent collections of the Smithsonian Institution, the Museum of Modern Art, the British Museum, and the Art Institute of Chicago. He received formal training in fine arts at Columbia University; lectured at Brown University; served as a Fellow in Art and Ethics at Carnegie Mellon University; and published scholarly work.

Boggs has been known to use actual-sized interpretations of money in his work. This case arises out of enforcement efforts by the United States Secret Service under color of 18 U.S.C. § 474 directed against certain of Petitioner's works of art. As the case comes to this Court (on summary judgment for the government), the record evidence is that the works of art are not counterfeit money. The works of art at issue are not themselves in the record—improperly, for reasons described below. But affidavits in the record from an Ivy League art professor, a museum curator, a distinguished art historian, and a commercial printer uniformly support Boggs' position that the art is readily distinguishable from money. The lower courts in this case declared the works of art contraband and forfeited to the United States under the

counterfeiting statutes. The District Court did so *ex parte* and the Court of Appeals affirmed without examining even one of them, whether an original or a reproduction —a review "*sine scrutatione*."

It is undisputed that Boggs has never defrauded anyone into believing that his works are really currency. The Distict Court in this case held that "no one seriously suggests [and no jury could find] that Mr. Boggs has any intent to defraud." *Boggs v. Bowron*, 842 F. Supp. at 557. The District Court also noted that Boggs "alters some of the design elements from genuine bills, such as replacing the signature of the Secretary of the Treasury with his own, changing the portrait on the front, or creating a denomination that does not exist. Boggs travels the country bartering his work for goods and services by explaining to merchants that he is an artist." App. 17a.

The Secret Service has repeatedly challenged Boggs' position—apparently on some sort of principle, for no person has ever complained to any law-enforcement authority about being defrauded by Boggs or by anyone else using his art. Apparently, the governmental interest is in "preserving the integrity" of a "property" interest in the "design and appearance" of currency. *See* Brief for Appellants in *Regan v. Time, Inc.*, 468 U.S. 641 (1984) at 14. One Treasury spokesman has publicly condemned artistic activities that would "defame the intrinsic value" of currency, adding: "[a]fter all, this is the currency of the United States of America, and that stands for something." Calvin Sims, "In Recycling of Greenbacks, New Meaning for Old Money," *New York Times*, May 22, 1994 at 1, 26.

The Secret Service's efforts to obtain prosecution of Boggs have failed. Three successive United States At-

torneys in three separate Districts have all declined prosecution.

By the time of the events in question in this case, the Secret Service knew about Boggs and his status as an artist. In 1990, Secret Service agents in Tampa concluded that Boggs lacked any criminal intent, and on their recommendation the United States Attorney for the Middle District of Florida declined prosecution.

The Warrantless Seizure. In March 1991, a Secret Service agent in Cheyenne, Wyoming "confiscated" fifteen works of art from Boggs. The agent had no warrant. Despite repeated demands, the Secret Service has refused to return the fifteen works or seek an adversarial judicial hearing approving the seizure. Like his counterpart in Florida, the United States Attorney for the District of Wyoming declined prosecution.

In September 1992, Boggs was on the faculty of Carnegie Mellon University in Pittsburgh, Pennsylvania. A Secret Service agent in Pittsburgh read a newspaper article about Boggs and opened a new investigation. The agent interviewed Boggs, read a report that the Cheyenne agent had written, looked at the fifteen works of art seized in Cheyenne, and submitted the materials he had gathered to the United States Attorney's Office for the Western District of Pennsylvania. On November 4, 1992, that office advised the Secret Service that "there is not enough at this time to merit prosecution of Boggs." Court of Appeals Joint Appendix ("J.A.") 234.

There matters stood on November 30, 1992, when an Assistant United States Attorney read another newspaper article about Boggs and an anticipated performance-art event called "Project Pittsburgh," in which the public itself would barter with Boggs' art over the coming year with the cooperation of a number of local merchants. Public

barter of locally or privately issued "script" is common in the United States. *See, e.g.*, Edward A. Gargan, "Giving Money Local Color," *New York Times*, May 28, 1998 at B1, B8. The newspaper reported that the Project would commence with a public performance by Boggs on December 2.

The Prior Restraint. The day that the newspaper report came out, according to internal Secret Service documents, "there was a major discussion of this case" attended by the United States Attorney, four Assistant United States Attorneys, and two representatives of the Secret Service's Pittsburgh field office, including the Special Agent in Charge. J.A. 234. The Secret Service had developed no new evidence of potentially criminal activity —only the newspaper article was new—so the government still had no basis to proceed with prosecution. Nonetheless, the government agents decided to use their criminal investigation powers to effect a prior restraint on Boggs. According to a Secret Service internal report, the "U.S. Attorney stated that we cannot allow this man to pass out $1 million in Boggs bills in the Pittsburgh area." J.A. 234. Later that day, the Secret Service and the AUSA "agreed that search warrants should be applied for and executed so as to keep Boggs from passing these bills." J.A. 235.

Four Secret Service agents executed warrants on December 2 at Boggs' home, studio, and office at Carnegie Mellon University. These agents seized any and all images of money, including framed works of art (some based on foreign currency including Swiss and British currency), a "sketch" of a twenty-dollar bill, a "duplicate of a million dollar note," air fresheners, a sponge, a calculator, a bow tie, match books, a whistle, and a video tape of a BBC documentary film featuring Boggs. In all, the agents seized more than 1300 items, including hundreds of works of art.

These actions were flatly contrary to this Court's fundamental tenet that except in extraordinary circumstances —and even then, only with adequate procedural safeguards—prior restraints on speech may not be used to prevent potential criminal acts:

> The presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand.

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558-59 (1975); *accord Vance v. Universal Amusement Co.*, 445 U.S. 308, 316 n.13 (1980).

There was no question that these government agents knew that the "Project Pittsburgh/Boggs Bills" they intended to seize were art—and no question that only three weeks earlier the United States Attorney had concluded that the facts provided no basis for prosecution. Their acts that day were—pure and simple—a prior restraint on speech.

The Government's Unilateral Confiscation of the Property. After the mass seizure—which ironically did not include seizure of the "Project Pittsburgh/Boggs Bills"—government activity with respect to Boggs halted. In 1995, the United States Attorney in Pittsburgh formally declined prosecution—the third formal declination of prosecution of Boggs from the three United States Attorneys who had considered the matter. Shortly after this, Boggs' counsel wrote to the government demanding return of Boggs' property: "should the [government] decide not to seek civil forfeiture—a determination that has been unduly delayed—we expect all of our client's property

to be returned promptly." J.A. 166. The government responded: "We will not file a civil forfeiture action, but will merely keep the contraband." J.A. 167.

Proceedings in the District Court.[2] Boggs commenced an action in the United States District Court for the District of Columbia seeking (*inter alia*) return of the property and demanding a jury trial.[3] Boggs moved for summary judment, arguing that the warrantless seizure in Cheyenne and the lack of any adversary hearing were clear violations of the First Amendment's prohibition on prior restraint without adequate procedural safeguards, and that the universal remedy for the improper seizure of property presumptively protected by the First Amendment is the return of the material.

The government did not deny any of the factual allegations supporting Boggs' motion. The government also conceded that—in general—warrantless seizures and failure to seek a post-seizure adversarial hearing violate the First Amendment and that an appropriate remedy for such a violation is return of the seized property. Yet the government argued that the bills were contraband *per se* so that the First Amendment simply did not apply.

Boggs opposed the government's attempt to secure a forfeiture without proving to a jury that the art in question actually violated the counterfeiting laws. Boggs also moved for a hearing. In response, the government made

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[2] We are sorry to say that the proceedings in the lower courts involved conduct that the Court will find extraordinary. We must therefore ask the Court's indulgence to present a lengthier description of these proceedings than would normally be expected in a petition for certiorari.

[3] Boggs also sought a preliminary injunction against prosecution, which the courts below denied. *Boggs v. Bowron*, 842 F. Supp. 542 (D.D.C. 1993), *aff'd*, 67 F.3d 972 (D.C. Cir. 1995), *cert. denied*, 517 U.S. 1134 (1996).

some sort of *ex parte, in camera* submission to the District Court, to which Boggs was not privy. The record contains none of the works submitted *in camera* to the District Court or even copies of them.

The District Court made no transcript of the *in camera* inspection. There is no record of exactly what items the District Court reviewed. There is no record of how long any particular item was studied. And there is no record of whether the government presented any *ex parte* argument, although on appeal the government lawyers who replaced the AUSA responsible for the *ex parte* submission denied that the *ex parte* submission included argument.[4]

The District Court did not invite Boggs to attend the *in camera* proceeding, personally or through counsel. The government provided Boggs no advance notice of its submission nor any specific description of which works of art it put before the District Court. He had no opportunity to present argument or witnesses. He had no opportunity to place the alleged "contraband" in the context of the other art that had been seized but which the government was not contending was contraband. He had no opportunity to present arguments by counsel pointing to various facts in the record tending to rebut the government's assertion that the pieces of art held to be "contraband" were in fact contraband, including sworn statements not only from plaintiff, but from four witnesses—an expert on American painting, the Chairman of Brown University's Department of Visual Art, the curator of the Andy Warhol Museum, and a printer with a lifetime of relevant industry experience. He had no opportunity even to present

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[4] The AUSA responsible for the case died between the *ex parte* submission and the Court of Appeals argument. He does not appear to have left any record of his conduct of the *ex parte* submission.

argument directed to the look and feel of the individual pieces of art put before the District Court, not knowing which they were out of the several hundred that had been seized.

The District Court's Decision. Four business days after the government mailed out a notice of this closed-door session, the District Court granted summary judgment for the government and dismissed the complaint.[5] It did so without addressing the items that the government conceded were not contraband (App. 32a n.4)—and thus should have been ordered returned—and without addressing with specificity any of the items it held to be contraband.

The District Court acknowledged that Boggs' work is protected by the First Amendment (App. 23a n.2) and that "Boggs accurately notes that the proper remedy for the unconstitutional seizure and retention of property is return of the material." App. 30a. The Court added that "the length of time that has elapsed between the seizures and the government's final decision not to prosecute—almost two years—mitigates [*sic*] in favor of plaintiff's claim for the return of his goods." App. 30a-31a. And the Court observed that each work of art is "unique such that individual determinations" of their legality must be made. App. 34a.

However, the District Court held that the procedural safeguards set forth by this Court in a line of cases including *Freedman v. Maryland,* 380 U.S. 51 (1965), and *Fort Wayne Books, Inc. v. Indiana,* 489 U.S. 46 (1989), apply only in obscenity cases, and therefore were not triggered by the warrantless seizure in Cheyenne or the mass seizures in Pittsburgh. The District Court did not attempt

[5] The record does not indicate whether the *ex parte* session took place *before* or *after* the government mailed its notice.

to rationalize its inverted First Amendment hierarchy—in which artistic and political speech receives no immunity from a prior restraint effected with or without a search warrant, but obscene speech (which ordinarily falls completely outside the ambit of First Amendment protection) *is* so protected.

Having rejected Petitioner's application of First Amendment doctrine, the District Court then went on to rule that the art it had seen *ex parte* and *in camera* was contraband. The District Court explained that it had "accepted" the government's "invitation" to "rule on the basis of its own observations," "conducted an *in camera* [and *ex parte*] review of all of the Pittsburgh materials," and decided that "all of the items that the Secret Service contends are contraband are, to this court's satisfaction, reproductions of genuine currency" and therefore "are contraband." App. 34a-35a. Approximately 80 of the more than 1300 seized items apparently fell into this category. *Id.* Which they are, Petitioner knows not.

The District Court did not view all 1300 items that the Secret Service had seized. Exactly how many items the government put before it to view—and what they looked like—cannot be ascertained from the record. The Court's opinion states only that it "examined all of the *disputed* Boggs Bills seized in *Pittsburgh*." App. 34a (emphasis supplied). None of the seized items—contraband or not—ever found their way into the record where they could be examined by the public or by the reviewing courts. They remain locked in the vault of the Secret Service, where they have been since they were seized in 1991 and 1992. Boggs was not offered an opportunity to visit them before, during, or after the *in camera* submission. He has not seen them for many years.

The Court of Appeals' Decision. A divided panel of the United States Court of Appeals for the District of

Columbia Circuit affirmed. The panel agreed unanimously that the First Amendment applied here and that "[t]he Supreme Court has indeed held law enforcement officers to a higher standard when presumptively expressive materials are involved because of the risk of prior restraint and censorship." App. 6a. But, following the District Court, it held that "[t]he important First Amendment concerns advanced by the Supreme Court in the obscenity cases are not present to the same extent here." App. 7a. The panel reasoned that procedural safeguards are necessary in obscenity cases because such cases require "significant judgment," even while conceding that the statute here requires the exercise of "some judgment." *Id.* The panel did not otherwise discuss the many decisions of this Court holding—in a wide variety of contexts—that *any* system of prior restraint requires adequate procedural safeguards including specific and brief time limits and a prompt adversarial hearing in which the government bears the burden of going to court and the burden of proof once in court.

Astoundingly, in affirming the judgment, the panel majority refused to look at the art in question and considered the *ex parte* nature of the proceedings in the District Court "insignificant." App. 8a. The majority argued that Boggs was "free to request access to the materials" submitted *ex parte* by the government (without acknowledging that the District Court entered judgment only four business days after the government mailed its "notice of *in camera* submission"). *Id.* No basis exists in the Federal Rules of Civil Procedure for this interesting procedure: *ex parte* submission, notice thereof by mail, and then a race to the courthouse with a "request for access." The majority begrudgingly admitted that its holding could not be squared with cases forbidding *ex parte* evidence in civil actions, arguing that "if there was error, we hold that it was insignificant and Boggs could have avoided

any ill effect by proper motion below" (presumably in the two days between receipt of the notice of *ex parte* submission and entry of the judgment). App. 8a. In her dissenting opinion, Judge Rogers observed that it is "impossible to characterize *ex parte* receipt of unknown materials not in the record as 'insignificant.'" App. 15a n.7.

Boggs moved in writing for supplementation of the record. Denying his written motion to supplement the record and ignoring the substantive thrust of his brief—that review was impossible absent a complete record—the panel majority simply refused to look at the core, operative evidence—the "contraband" art—on the theory that appellant had waived the right to review on a complete record. App. 8a, 10a.[6]

Judge Rogers dissented on this issue. She wrote:

> Given that this case involves government regulation —indeed, confiscation—of expressive materials, and that art may at times imitate reality, this court is obliged on *de novo* review of the grant of summary judgment to look at the Boggs bills to determine if they meet the statutory criteria for counterfeit currency.
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> Without viewing the bills, this court cannot determine for itself whether the district court correctly applied

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[6] Boggs' principal argument on appeal (Point I in his Brief) was that the District Court's acceptance of *ex parte* evidence and failure to make a record required a remand at minimum. Boggs expressly relied on *Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986), *aff'd by an equally divided court*, 484 U.S. 1 (1987), and *Liberty Lobby, Inc. v. Rees*, 852 F.2d 595, 598 (D.C. Cir. 1988) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-86 (1964)). The government opposed a remand and argued in footnotes (a) that the Court of Appeals should look at the works of art itself even though they were not in the record, and (b) that appellant should have moved for an order instructing the government to supplement the record even though the government did not so move.

> the law, or even if it applied the correct law. It is not sufficient to rely, as the [majority] does, on the district court's recitation of the correct statutory standards. Elsewhere in its opinion, the district court described 18 U.S.C. § 474 as essentially objective, yet it appears to incorporate a substantial degree of subjectivity. In addition, the district court's findings that a sponge and bow tie are in the "similitude" of actual currency raises questions about its statutory interpretation that warrant scrutiny on appeal.

App. 12a-13a (footnotes omitted).

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW ERODES FIRST AMENDMENT SAFEGUARDS AGAINST PRIOR RESTRAINTS

This Court has consistently held that any system of prior restraint must meet certain fundamental procedural safeguards, including a requirement that the restraint be subject to prompt and meaningful judicial review. Generally, the burden of going to court and the burden of proof in court must also rest with the government.

In *Freedman v. Maryland*, 380 U.S. 51 (1965), the Court struck down a motion picture censorship statute that failed to provide adequate procedural safeguards. Building on earlier precedent,[7] the Court ruled unanimously that a motion picture censorship system was unconstitutional because it did not (1) contain a specified, brief period for the restraint, (2) provide expeditious judicial review, and (3) impose on the government the burden

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[7] *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964); *Marcus v. Search Warrants*, 367 U.S. 717 (1961). These cases held that expressive materials may not be seized in anticipation of a criminal prosecution without a prompt adversarial hearing, and that the remedy for violation of this requirement is return of the seized materials.

of going to court to suppress the speech and bear the burden of proof once in court. The statute under review in *Freedman* applied to all motion pictures (other than newsreels), and the state conceded that the film at issue would have qualified for a license had the exhibitor applied for one.

Ten years later, this Court recognized *Freedman* as stating "[t]he settled rule is that a system of prior restraint 'avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system.'" *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975). In *Southeastern Promotions*, the Court held unconstitutional a municipality's refusal to license a production of the musical "Hair," because the denial of the license had been unaccompanied by adequate procedural safeguards. The Court ruled against the government *not* as an effort to protect obscenity, but because "[i]nsistence on rigorous procedural safeguards under these circumstances is 'but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks.'" *Id.*, 420 U.S. at 561 (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963)).

In *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), the Court struck down a content-neutral licensing system as failing to provide adequate procedural protections. The Court observed that "[t]he core policy underlying *Freedman*" requires (1) that the restraint not exceed a specified and reasonable time period, and (2) that "there must be the possibility of prompt judicial review in the event that the license is erroneously denied." *Id.*, 493 U.S. at 228.

From the perspective of two and a half decades, *Freedman*'s author observed: "We have never suggested that our

insistence on *Freedman* procedures might vary with the particular facts of the prior restraint before us. To the contrary, this Court has continued to require *Freedman* procedures in a wide variety of contexts." *FW/PBS*, 493 U.S. at 239 (Brennan, J., concurring).

And in *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989), the Court again struck down a prior restraint that was not the product of adequate safeguards—this time, a pretrial seizure of books alleged to be the fruits of a racketeering enterprise. Writing for a Court that was unanimous on this issue, Justice White explained that "this Court has repeatedly held that rigorous procedural safeguards must be employed before expressive materials can be seized as 'obscene.'" *Id.*, 489 U.S. at 62. Of course, the basis for the decision was not that obscenity requires some sort of heightened protection. It does not. Instead, this Court explained, "[i]t is the risk of prior restraint . . . that motivates this rule." *Id.*, 489 U.S. at 63-64 (internal quotations and citation omitted).

To be sure, as the Court of Appeals in this case observed, the rule of *Freedman* has been applied frequently to prior restraints on speech of a sexually explicit nature. But—at least until now—such requirements have also applied without exception to a wide variety of speech on subjects of every other kind and character, including public assembly and parades by groups of every political persuasion,[8] traditional news reporting,[9] charitable fund rais-

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[8] *National Socialist Party of Am. v. Village of Skokie*, 432 U.S. 43, 44 (1977) (*per curiam*) ("[i]f a State seeks to impose a restraint of this kind, it must provide strict procedural safeguards"); *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150 (1969); *Carroll v. President & Commrs. of Princess Anne County*, 393 U.S. 175, 180 (1968); *see Hague v. CIO*, 307 U.S. 496 (1939).

[9] *New York Times v. United States*, 403 U.S. 713, 714 (1971); *Nebraska Press Assn. v. Stuart*, 423 U.S. 1319 (1975) (Blackmun, J., in chambers).

ing,[10] and—as in *Freedman* and *Southeastern Promotions* —popular entertainment.

The Court of Appeals' opinion in this case substantially erodes these well-established First Amendment protections against prior restraints—unless the expression at issue happens to be obscene. So far as we know, the D.C. Circuit opinion in this case is the first time a court has provided obscenity *more and better* protection than other speech—in this case, works of art made by a classically trained artist.

Certainly nothing in this Court's jurisprudence suggests that the danger to be avoided with procedural safeguards is limited to speech of a sexual nature—let alone obscenity, which ordinarily enjoys no First Amendment protection at all. *See United States v. Thirty Seven Photographs*, 402 U.S. 363, 376 (1971).

The Court of Appeals recognized that this Court crafted the First Amendment requirements of a warrant and a prompt adversary hearing—which admittedly were not met in this case—"because of the risk of prior restraint and censorship." App. 6a. That is true. This Court has repeatedly explained that the warrant and hearing requirements serve as a procedural bulwark against prior restraints. *See Fort Wayne Books*, 489 U.S. at 63 ("It is 'the risk of prior restraint' . . . that motivates" the rule that requires an adversary hearing) (internal quotation omitted); *accord Bantam Books*, 372 U.S. at 66; *Marcus*, 367 U.S. at 724-29 (describing history of prior restraint at common law and concluding that the framers fashioned the First Amendment to prevent "the suppression of innocent expression" that "inhered in the discretion confided in the officers to exercise the power" of prior restraint).

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[10] *Riley v. National Federation of Blind of N.C., Inc.*, 487 U.S. 781, 802 (1988); *see Cantwell v. Connecticut*, 310 U.S. 296 (1940).

Moreover, this Court has explained that the need to prevent prior restraints "is obviously true for books or any other expressive materials." *Fort Wayne Books*, 489 U.S. at 63.

Yet the Court of Appeals attempted to distinguish this Court's precedents on the theory—never expressed in the cases—that "significant judgment" is needed to determine if the seized materials are contraband in obscenity cases, while saying that only "some judgment" is needed in this case. App. 7a. The Court cited no case in support of this theory and suggested no means to distinguish between subject matters like obscenity—which the Court of Appeals said required "significant judgment"—and other subjects—which the Court said required only "some judgment" and accordingly can be forfeited through *ex parte* proceedings. We note that in the "judgment" of the Secret Service, a sponge and a bow tie with images of money on them are "counterfeit" under 18 U.S.C. § 474, a statute that requires the government to prove that the items bear "such a likeness or a resemblance to a genuine obligation . . . as is calculated to deceive an honest, sensible and unsuspecting person of ordinary observation and care dealing with a person supposed to be honest and upright." [11] As Judge Rogers pointed out in her dissenting opinion, the standard "appears to incorporate a substantial degree of subjectivity." App. 13a.

To be sure, the Court of Appeals may have been led astray because many cases expressing the *Freedman* requirements arose out of seizures of sexually explicit ex-

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[11] *United States v. Hall*, 801 F.2d 356, 357-58 (8th Cir. 1986) (reviewing cases dating back more than a century and concluding "[t]he similitude jury charge has received general acceptance in § 474 prosecutions"); *United States v. Johnson*, 434 F.2d 827, 829 (9th Cir. 1970); *see* 2 Edward J. Devitt, *et al.*, *Federal Jury Practice & Instructions*, § 29.12 (4th ed. 1990).

pression. But this Court has repeatedly applied the *Freedman* requirements to a wide variety of subject matters, including business, politics, and popular culture. *See supra* pp. 13-16 & nn.8-10. The Court has never suggested (as the Court of Appeals held) that sex should receive more and better protection than other forms of discourse. Indeed, just the opposite is true:

> In the present case [involving "political and social expression"], the reasons for insisting upon an opportunity for hearing and notice . . . are even more compelling than in cases involving allegedly obscene books. . . . "It is vital to the operation of democratic government that the citizens have facts and ideas on important issues before them. . . . On the other hand, the subject of sex is of constant but rarely particularly topical interest."

Carroll, 393 U.S. at 182 (quoting *A Quantity of Copies of Books*, 378 U.S. at 224 (Harlan, J., dissenting)); *accord Shuttlesworth v. Birmingham*, 394 U.S. at 162 (Harlan, J., concurring).

The panel concluded its analytical justification for permitting this prior restraint by stating that "the inquiry [in this case] is not inherently content-based and thus poses little risk of acting as a prior restraint on expressive materials." App. 7a. But the panel's assertion that the prior restraint here was inoffensive because it was supposedly content-neutral is simply not a correct statement of law. "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (quoting *Bantam Books*, 372 U.S. at 70).

This Court has held repeatedly that even a content-neutral prior restraint is unconstitutional if not accompanied by adequate procedural safeguards—safeguards that

the panel acknowledged were lacking here. *See FW/PBS v. City of Dallas*, 493 U.S. at 223 (striking down statute without reaching whether it was content neutral); *Southeastern Promotions*, 420 U.S. at 562 (procedural shortcomings were "unrelated to the standard that the board applied"); *Shuttlesworth*, 394 U.S. at 155 n.4 (content-neutral time, place, and manner regulation must provide for "expeditious judicial review").

Without review in this Court, other courts will be tempted to follow the trail blazed by the D.C. Circuit, permitting prior restraints on speech where, as here, judges conclude that merely "some judgment" is required of the censor, rather than "significant judgment." It is no defense of a system of censorship that it can be implemented by censors of marginal ability rather than by Platonic Guardians. Until now, the courts' prohibition on prior restraints has not been dependent on the quantum of "judgment" the censor must exercise, but rather rested on the tenet that such judgment must not be exercised at all without adequate procedural oversight. Thus, the Second, Fourth, Fifth, Eighth, and Eleventh Circuits have all applied the doctrine requiring procedural safeguards to a variety of cases that do not involve sex.[12] The D.C. Circuit stands alone in limiting the rule as it has.

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[12] *Nutritional Health Alliance v. Shalala*, 144 F.3d 220, 227-28 (2d Cir. 1998) (applying rule of *Freedman* to commercial speech); *New York Magazine v. Metropolitan Trans. Auth.*, 136 F.3d 123, 131-32 (2d Cir. 1993) (same); *Telco Communications, Inc. v. Carbaugh*, 885 F.2d 1225, 1232-33 (4th Cir. 1989) (same); *Quarterman v. Byrd*, 453 F.2d 54, 60 (4th Cir. 1971) (distribution of printed material requiring approval of high-school principal); *Fernandes v. Limmer*, 663 F.2d 619, 628 (5th Cir. 1981) (ordinance governing literature distribution and fundraising at airports); *Walker v. Wegner*, 624 F.2d 60, 62 (8th Cir. 1980) (charitable solicitation); *Miami Herald Pub. Co. v. City of Hallandale*, 734 F.2d 666, 675-76 (11th Cir. 1984) (newsrack licensing ordinance).

Such a holding would be troubling in any context. It is particularly troubling here, because the statute at issue, 18 U.S.C. § 474, was said by the lower courts to criminalize the possession of any image that looks sort of like money—even a novelty item like a sponge or a bow tie with a picture of money on it. Violation of the statute carries a maximum prison term of 25 years—even more severe than the fifteen-year penalty for actual counterfeiting. 18 U.S.C. §§ 471, 472, 474, 3581(b)(2). This, to protect the government's "property interest" in the "integrity" of the "design and appearance" of currency. *See supra* p. 3.

As interpreted below, the statute covers a wide variety of speech that bears no risk of promoting counterfeiting or fraud. Dozens of publishers and advertisers every year print millions of copies of the image of United States currency, all "violations" of the statute as interpreted below—that is, pictures including images of money. The image of currency is commonplace. It is on the covers and pages of popular magazines, billboards, coupons, and clothing. The record in this case includes a survey showing that dozens of popular magazines published more than 85 million copies of felony "violations" of the statute as interpreted below in a single, six-month period. Thus the courts have not only authorized governmental self help, but have "criminaliz[ed] a broad range of apparently innocent conduct," *Liparota v. United States*, 471 U.S. 419, 426 (1985), in a way that interferes with "settled expectations that the contents of magazines and films are generally [not] subject to stringent public regulation." *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 71 (1994).

II. THE DISTRICT COURT'S *EX PARTE* FORFEITURE OF PROPERTY WARRANTS REVIEW

The panel opinion establishes an interesting and dangerous precedent by which the government may effect

forfeiture unilaterally. Henceforth, the government may unilaterally seize anything it thinks is contraband and then "merely keep" it. No further action need be taken until the owner files a lawsuit, at which time the government may cherry-pick samples of the "contraband," bring them to the district judge for an *ex parte, in camera* examination, and the district judge can then give the seizure a judicial *imprimatur*.

Forfeiture actions are not supposed to work that way. Due process requires notice and an opportunity to be heard before any forfeiture. *Degen v. United States*, 517 U.S. 820, 822 (1996); *Fuentes v. Shevin*, 407 U.S. 67, 80-81 (1972). Due process does not permit the government to "merely keep" what it alone has determined is "contraband." Nor does it permit forfeitures to be decided on the basis of *ex parte* submissions of the government without the opportunity of the owner to be heard, to offer testimony and other evidence, and to cross-examine the government's witnesses. According to the Court of Appeals' opinion, though, due process requires the owner to make an urgent "request for access" (on two days' notice) or forever waive his right to the ordinary adversarial process.[13]

In *Robinson v. Hanrahan*, 409 U.S. 38, 39-40 (1972), this Court reversed dismissal of a property owner's action for return of property on the ground that the owner did not receive actual notice of the forfeiture hearing. Here, there was not even a hearing. More recently, in *United States v. James Daniel Good Real Property*, 510 U.S. 43, 48-49 (1993), this Court held it is impermissible even for the government to seize property *ex parte* in anticipation of a *later* public forfeiture hearing. In that case, the gov-

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[13] The notice did not say that access would be granted—it was simply notice of a *fait accompli*.

ernment seized property owned by an individual convicted of a narcotics offense. Under the forfeiture statutes involved in that case, property purchased with the proceeds of narcotics would be forfeited to the government. Despite the almost automatic nature of the forfeiture, this Court held that the *ex parte* seizure and retention of Good's property was a violation of the Fifth Amendment, under the "general rule that individuals must receive notice and an opportunity to be heard before the Government deprives them of property." *Id.* at 48.

Before joining this Court, Justice Ginsburg explained why judgments are not supposed to be made on the basis of *ex parte* submissions:

> It is a hallmark of our adversary system that we safeguard party access to the evidence tendered in support of a requested court judgment. The openness of judicial proceeding serves to preserve both the appearance and the reality of fairness in the adjudications of United States courts. It is therefore the firmly held main rule that a court may not dispose of the merits of a case on the basis of *ex parte, in camera* submissions.

Abourezk v. Reagan, 785 F.2d 1043, 1060-61 (D.C. Cir. 1986), *aff'd by an equally divided court*, 484 U.S. 1 (1987); *accord Association for Reduction of Violence v. Hall*, 734 F.2d 63, 67 (1st Cir. 1984) (" 'Our system of justice does not encompass *ex parte* determinations on the merits of cases in civil litigation.' ") (*quoting Kinoy v. Mitchell*, 67 F.R.D. 1, 15 (S.D.N.Y. 1975)). This principle arises out of basic notions of fairness—exceptions to the rule are therefore rare. *Abourezk*, 785 F.2d at 1061.

As this Court explained, in another case invalidating a prior restraint on speech:

> The value of a judicial proceeding, as against self-help by the police, is substantially diluted where the

> process is *ex parte*, because the Court does not have available the fundamental instrument for judicial judgment: an adversary proceeding in which both parties may participate.

Carroll, 393 U.S. at 183.

The panel majority attempted to excuse the District Court's radical departure from accepted judicial conduct by blaming the victim, who was supposedly "free to request access to the materials" between his receipt of the "notice of *in camera* submission" and the entry of judgment two days later. The majority suggested that Boggs was at fault because he did not make a "timely objection to the submission below" in those two days. App. 8a. "If there was error," the majority asserted without further discussion, "we hold that it was insignificant and Boggs could have avoided any ill effect by proper motion below." *Id.* Boggs did not initiate the *ex parte, in camera* proceedings; the government did. The Court of Appeals majority dreamed up a remedy called a "request for access to items seen by the court but not in the record"—a procedure that is a stranger to the Federal Rules of Civil Procedure. Judge Rogers noted that "it is impossible to characterize *ex parte* receipt of unknown materials not in the record as 'insignificant.' " App. 15a n.7.

Forfeiture on contested fact issues should not be decided on the basis of *ex parte* review of the evidence. Boggs presented affidavits from distinguished witnesses that his art did not meet the standard required for a violation of the statute in question. Boggs would have been entitled to a jury in a civil forfeiture case. *See United States v. J.B. Williams Co.*, 498 F.2d 414, 422-23 (2d Cir. 1974) (Friendly, J.) (collecting numerous cases). He should not have been compelled—through government intransigence—to put his fate in the hands of a single individual making unexplained determinations outside the

record, outside public scrutiny, and outside effective appellate supervision.

III. THE COURT OF APPEALS' REFUSAL TO LOOK AT THE CORE EVIDENCE PRESENTS A RADICAL DEPARTURE FROM ACCEPTED JUDICIAL BEHAVIOR AND IS OUT OF STEP WITH THE RULE IN OTHER CIRCUITS

On appeal from an order granting summary judgment, a reviewing court is supposed to examine the record *de novo,* drawing all reasonable inferences in favor of the appellant. *See Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 466 n.10 (1993); *United States v. Diebold, Inc.*, 369 U.S. 654 (1962) (*per curiam*). Furthermore, in cases that implicate First Amendment issues, "an appellate court has an obligation to make an independent examination of the whole record." *New York Times Co. v. Sullivan,* 376 U.S. 254, 284-86 (1964).

Yet the panel majority in this case actually refused a written request that it review the core, operative evidence —which was, bizarrely, not in the record! We have found no other such case in any context—let alone in a contested forfeiture action over expressive material admittedly entitled to First Amendment protection.

The panel divided on this issue. The majority contended that Boggs waived his right to review on a full record. That contention was a transparently *ex ante* rationalization: Boggs complained, in Point I of his brief to the Court of Appeals, that review was impossible based on the absence from the record of the core evidence and expressly requested a remand to the District Court. Remand to supplement the record is not a novelty. It is the way other courts of appeals deal with insufficient records. For example, in *United States v. Wilson,* 116 F.3d 1066, 1081 (5th Cir. 1997), the record did not reflect the Dis-

trict Court's disposition of an *in camera* review of potential *Brady* material. The Fifth Circuit remanded for supplementation of the record, under seal if necessary. Remand—rather than the D.C. Circuit's novel "waiver" theory—has also been the rule in the First, Second, Fourth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits.[14] So far as our research has revealed, no other court of appeals has ever before refused a request for supplementation on a theory that the party seeking to supplement the record waived its right to do so.

Yet in this case, the majority below refused even to look at the art. The majority appears to have punished a litigant under a theory of "waiver" for complaining to the Court of Appeals rather than the District Court about his adversary's *ex parte* submission *dehors* the record, holding that he should have raced to the District Court with a "request for access" in the two days before that Court entered judgment.

This was an abdication of the Court of Appeals' role. An appeal should be decided on the record—the *real* record, not what the District Court chose to put in it. "Review of decisions based upon *in camera* examinations is difficult in the best of circumstances," *Senate of Puerto Rico v. Department of Justice*, 823 F.2d 574, 589 (D.C. Cir. 1987), and is impossible where, as here, the *in camera*

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[14] *United States v. Miranda-Santiago*, 96 F.3d 517, 519 (1st Cir. 1996); *United States v. Jiang*, 140 F.3d 124, 129 (2d Cir. 1998); *Salinger v. Random House*, 818 F.2d 252 (2d Cir. 1987); *Reinhold v. Virginia*, 151 F.3d 172, 175 (4th Cir. 1998); *Easley v. University of Mich. Bd. of Regents*, 853 F.2d 1351, 1358 (6th Cir. 1988); *Sarnoff v. American Home Prods.*, 798 F.2d 1075, 1079 (7th Cir. 1986); *Sierra Club v. United States Army Corps. of Eng'rs*, 771 F.2d 409, 413 (8th Cir. 1985); *United States v. Kimmel*, 672 F.2d 720, 722 (9th Cir. 1982); *United States v. Preciado-Cordobas*, 923 F.2d 159 (11th Cir. 1991); *Ross v. Kemp*, 785 F.2d 1467, 1477 (11th Cir. 1986) (*en banc*).

evidence never makes it into the record. It is therefore an axiom of appellate practice that, "if the record lacks sufficient information to indicate the factual basis for the trial court's finding, then no review is possible since the circuit court cannot determine if the finding was erroneous." 19 J. Wm. Moore, *Moore's Fed. Practice* ¶ 206.03[6] at 206-20 (3d ed. 1998). By refusing to supplement the record, the D.C. Circuit put itself out of step with other circuits, which have uniformly followed this practice.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 3, 1999

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 8, 1998 Decided November 6, 1998

No. 97-5313

J.S.G. BOGGS,

Appellant,

v.

ROBERT E. RUBIN, SECRETARY OF THE TREASURY, *et al.*,

Appellees.

Appeal from the United States District Court
for the District of Columbia
(No. 93cv01845)

Before: GINSBURG, SENTELLE and ROGERS, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* SENTELLE.

Separate opinion, concurring in part and dissenting in part, filed by *Circuit Judge* ROGERS.

SENTELLE, *Circuit Judge:* Appellant J.S.G. Boggs, who describes himself as an internationally-recognized artist, creates images of currency which he uses in transactions designed to explore the meaning and value of money. He appeals from a district court grant of summary judgment

ruling that his reproductions of United States currency violate federal counterfeiting statutes, making them contraband *per se* and forfeit as a result. Boggs raises three claims of error before this court. First, he argues that his "Boggs Bills" are protected by the First Amendment, and that this case is controlled by the line of cases creating increased preseizure procedural safeguards for expressive materials. Because those safeguards were not observed, he argues, it was improper for the district court to reach a judgment on the merits. Second, he argues that the district court erred by conducting an *in camera, ex parte* examination of his work when ruling on cross-motions for summary judgment. Finally, he contends that the court below applied the wrong standard in determining that the bills are counterfeit. Boggs argues that these errors require us to order the government to return his artwork, or grant him an adversarial hearing in open court. We disagree. The district court correctly stated and, so far as we can tell from the record before us, correctly applied the appropriate standards in this case. We affirm for the reasons stated below.

I. BACKGROUND

The extensive factual background has been discussed in detail in *Boggs v. Bowron*, 842 F. Supp. 542, 544-46 (D.D.C. 1993), *aff'd*, 67 F.3d 972 (D.C. Cir. 1995) (unpublished table decision), and *Boggs v. Merletti*, 987 F. Supp. 1, 3-6 (D.D.C. 1997), and we need not reiterate it here. We supply only the detail necessary to explain our decision. Art is supposed to imitate life, but when the subject matter is money, if it imitates life too closely it becomes counterfeiting. Boggs creates *trompe l'oeil* (so lifelike as to fool the eye) images of U.S. currency with alterations such as substituted names or pictures, or nonexistent denominations, but generally with the same size,

shape, layout and color as legal tender. Boggs then barters his drawings in return for goods and services. He has spent thousands of his pictures as currency since he began this project. No one contends that Boggs intends to defraud his customers. Boggs explains to the people receiving his bills that he is an artist and that the bills are not real cash. He then engages them in a discussion on the value of money and the social and political institutions that underlie the system of exchange. But the transactions do not end there. Bogg's ultimate customers come to him to purchase the entire transaction. Boggs gives them a receipt for the goods he purchased, the change he received, and the name of the person who accepted his "Boggs Bills" as payment. The buyer goes to the holder of the Boggs Bill and negotiates a purchase price. Boggs then works with the buyer, putting together a display including the art work, the receipt and the change.

Because of the nature of his work, Boggs has drawn the attention of the counterfeiting investigators of the Secret Service on many occasions, although he has never been criminally prosecuted. This case arose because in two separate events, in Cheyenne, Wyoming, in 1991 and Pittsburgh, Pennsylvania, in 1993, Secret Service agents seized Boggs's artwork as contraband counterfeit bills violating the requirements of 18 U.S.C. § 474.

In Cheyenne, Secret Service agents were told that Boggs had tried to buy goods at a local Kmart, explaining that he wanted to get face value for a $100 Boggs Bill. A Secret Service agent and the U.S. Attorney for the District of Wyoming visited his hotel room without a warrant and, after what Boggs characterized as tense negotiations conducted under the threat of arrest, fifteen Boggs Bills were taken from his hotel room. Boggs was never criminally prosecuted.

In Pittsburgh, Boggs planned to proceed on a much grander scale. He conceived and publicized "Project Pittsburgh," his plan to spend $1 million in Boggs Bills in the Pittsburgh area, asking each recipient to pass the bill 5 times before taking it out of circulation. In November 1992, officials from the United States Attorney's office and the Secret Service met and discussed Boggs's plans. The group decided that Boggs could not be allowed to distribute $1 million in Boggs Bills. Secret Service agents acting pursuant to warrants seized more than 1,300 items from Boggs's home and studio.

Boggs requested the return of all of his property, exhausted his administrative remedies and began this action.

II. PROCEEDINGS IN THE DISTRICT COURT

Boggs filed an action in the district court on September 3, 1993, seeking an injunction against prosecution and the return of the Boggs Bills seized in Cheyenne and Pittsburgh. On December 9, 1993, the district court denied the preliminary injunction and refused to enjoin future prosecution. *See Bowron,* 842 F. Supp. at 562-63. The district court also ruled that 18 U.S.C. §§ 474 and 504 are constitutional on their face and as applied. Boggs filed an interlocutory appeal with this court on the First Amendment issue, seeking a ruling that the First Amendment prevented the counterfeiting sections from applying to his work. In October, 1995, on interlocutory appeal we upheld the district court's decision that the statute was constitutional. We affirmed the district court's denial of injunctive relief and remanded. *See Boggs v. Bowron*, 67 F.3d 972 (D.C. Cir. 1993) (unpublished table decision).

Following remand, both parties made cross-motions for summary judgment. Boggs argued that the warrantless seizure in Cheyenne and the seizure without a prior hearing

in Pittsburgh violated heightened First Amendment procedural guarantees for presumptively expressive materials, and that the appropriate remedy was return of the seized goods. Boggs also argued that the heightened standards previously applied in obscenity cases, including the right to a pre-seizure adversarial hearing, should have been applied in this case. The government argued that the First Amendment's heightened standards do not apply, and that a judicial hearing is not constitutionally required after the seizure of counterfeit currency. The government also argued that it could not be required to return the Boggs Bills because they are contraband prohibited by 18 U.S.C. §§ 474 and 481.

Boggs moved for a hearing in open court to determine if the bills were contraband *per se* and was denied one by the district court. On October 23, 1997, the district court inspected *in camera* all of the Boggs Bills seized in Pittsburgh. The court agreed with the Secret Service that certain bills were contraband within the meaning of sections 474 and 481 of the criminal code, and that they could not be returned to Boggs. The district court therefore granted the government's motion for summary judgment and dismissed the case with prejudice.

III. Analysis

A. Contraband per se

We need not determine whether the Cheyenne seizure was legal under the Fourth Amendment because Boggs dos not challenge the premise that if the seized bills violate the likeness or similitude standards in 18 U.S.C. § 474, they are contraband *per se* and cannot be returned. Contraband *per se* comprises objects which are inherently unlawful to possess, regardless of how they are used. As we explain below, the Boggs Bills in this case fall within

that category. The district court properly noted that "[i]ndividuals have no property right in contraband materials and contraband materials may not be returned to them." *Merletti*, 987 F. Supp. at 10. This Circuit addressed the issue in United States v. Farrell, 606 F.2d 1341, 1344 (D.C. Cir. 1979):

> Decisional law recognizes two kinds of contraband. Traditional or *per se* contraband is defined as "objects the possession of which, without more, constitutes a crime." *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699, 85 S.Ct. 1246, 1250, 14 L.Ed.2d 170 (1965). It is well established that a claimant has no right "to have [*per se* contraband] returned to him." *United States v. Jeffers*, 342 U.S. 48, 54, 72 S.Ct. 93, 96, 96 L.Ed. 59 (1951); *Trupiano v. United States*, 334 U.S. 699, 710, 68 S.Ct. 1229, 92 L.Ed. 1663 (1948).

We now turn to whether the District Court correctly found that the Boggs Bills were contraband *per se*.

B. First Amendment Considerations

The main thrust of Bogg's argument is not that the district court erred in its determination that the Boggs Bills violate the statutory requirements, but rather that the district court erred in looking at the bills at all. Boggs argues that special procedures established by the Supreme Court under the First Amendment protecting books and films in obscenity cases apply with equal force to his artwork. The Supreme Court has indeed held law enforcement officers to a higher standard when presumptively expressive materials are involved because of the risk of prior restraint and censorship. *See, e.g., Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 63 (1989) (recognizing the risk of prior restraint); *see also Roaden v. Ken-*

tucky, 413 U.S. 496, 501 (1973) (holding that seizure of expressive materials in some instances requires additional safeguards); *Heller v. New York*, 413 U.S. 483, 491-92, *Huffman v. United States*, 470 F.2d 386, 392 (D.C. Cir. 1971). Boggs suggests that the Secret Service should have met more stringent warrant requirements and that he should have been granted a prior adversarial hearing before an independent judicial officer. We disagree.

The cases Boggs cites are all obscenity cases, where significant judgment was needed to determine if the seized materials violated community standards. We need not determine the range of cases to which additional protection would apply. We simply hold that on the facts before us, they do not. The important First Amendment concerns advanced by the Supreme Court in the obscenity cases are not present to the same extent here. Bogg's artwork is designed to look like money. While some judgment is needed on the part of the officers charged with enforcing the counterfeiting statutes, the inquiry is not inherently content-based and thus poses little risk of acting as a prior restraint on expressive materials.

C. In Camera Examination

Boggs objects to the district court's *in camera* examination of the bills when ruling on the motions for summary judgment. He also alleges that there may have been inappropriate *ex parte* communication between the government and the district court when the Boggs Bills were submitted. We hold that he has no right to have the evidence examined in open court on motions for summary judgment. *See Spark v. Catholic Univ. of Am.*, 510 F.2d 1277, 1280 (D.C. Cir. 1975) (district court may "dispense with oral arguments in appropriate circumstances in the interest of judicial economy"). The district court awarded summary judgment in this case in accordance

with FED. R. CIV. P. 56(c) which states that "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." It is common practice for trial judges to examine not only written evidence, but also exhibits when deciding if there is a genuine issue of material fact. The existence of the specific bills is not a genuine issue of fact. The district court was applying the law to the bills before it to determine if they violated the counterfeiting statutes and were forfeit as contraband. We find nothing unusual in the district court conducting an *in camera* examination of the relevant evidence here. It appears that the district court properly examined the items submitted to it by the Secret Service, and there is nothing in either the district court's memorandum opinion or the record to suggest that it relied on any *ex parte* communication in reaching its decision.

Boggs now complains that he cannot tell from the record what was submitted, but he received notice from the government listing the items submitted. *See* Defendants' Notice of In Camera Submission, *reprinted* in Joint Appendix at 263 (listing the materials being presented to the court). Boggs was free to request access to the materials at that time. He did not. He failed to make a timely objection to the submission below, and did not move to supplement the record here under FED. R. APP. P. 10(e) or otherwise. If there was error, we hold that it was insignificant and Boggs could have avoided any ill effect by proper motion below.

D. Wrong Standard

Finally, we find that Boggs's argument that the district court applied the wrong standard has no merit. We have already considered and upheld the district court's constitutional analysis. We now hold that the district court correctly stated the standard under 18 U.S.C. § 492, which provides in pertinent part:

> All counterfeits of any coins or obligations or other securities of the United States or of any foreign government, of any articles, devices, and other things made, possessed, or used in violation of this chapter or of sections 331-333, 335, 336, 642 or 1720, of this title, or any material or apparatus used or fitted or intended to be used, in the making of such counterfeits, articles, devices or things, found in the possession of any person without authority from the Secretary of the Treasury or other proper officer, shall be forfeited to the United States.

The district court correctly found that the statute prohibits the possession of bills made or executed after the similitude of United States obligations. Examining certain of the bills seized in Pittsburgh, the district court concluded that

> all of the items that the Secret Service contends are contraband are, to this court's satisfaction, reproductions of genuine currency of the United States or reproductions of genuine foreign currency. Each are in the likeness and similitude of genuine currency and therefore in violation of 18 U.S.C. §§ 472 or 481. Each reproduction has the general design and appearance of genuine United States or foreign currency. None of the pieces in dispute meet the size and coloration exemptions of 18 U.S.C. § 504 and 31 C.F.R. 411.1. This court is therefore compelled to hold that [the disputed items] are contraband. These items are

> therefore forfeited to the United States without the necessity of forfeiture procedures.

Merletti, 987 F. Supp. at 11. The district court properly applied the same analysis regarding the bills seized in Cheyenne.

Boggs now asks us to overturn the district court's grant of summary judgment on the merits. On brief, he opposed the government's offer to present the Boggs Bills to this court, only changing his position during oral argument. After oral argument, he moved to supplement the record, and now asks that he be allowed to argue the merits of the district court's determination that the bills violate the counterfeiting statute. This is simply too late in the appellate process, and we hold that he has waived any right to our full examination of the evidence. Rule 28(a)(4) of the Federal Rules of Appellate Procedure requires that the appellant's argument "contain 'the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on.'" See *Carducci v. Regan*, 714 F.2d 171 (D.C. Cir. 1983) (refusing to determine issue that had not been fully briefed by parties). If Boggs wished this court to make a full reexamination of the merits of the grant of summary judgment, it was his duty as appellant to request that this court do so and present argument on that question. We will not consider at this late stage an argument that the appellant failed to raise.

IV. CONCLUSION

We conclude that the district court did not err either in the procedure it followed or the standard it applied in ruling on the motions for summary judgment before it and concluding that the bills it examined were forfeit as contraband. The judgment of the district court is affirmed.

ROGERS, *Circuit Judge*, concurring in part and dissenting in part: The court affirms on de novo review the district court's grant of summary judgment by concluding that "art" it has never seen is "so far as we can tell" contraband *per se*. *See* opinion at 2. Boggs should not be too surprised by this result, as his appeal focused on his First Amendment procedural claim without explicitly contending that his art does not meet the statutory definition of counterfeit currency. Rather, he contended that the district court applied the wrong standard in concluding his art was counterfeit under 18 U.S.C. § 474. But on de novo review, where this court "sits in the same position as the district court," [1] we cannot truncate Boggs' contentions as quickly and neatly as the court would like.

Implicit in Boggs' challenge to the manner in which the district court reviewed his work and the gloss the court imposed on 18 U.S.C. § 474 is the assumption that if he does not prevail on these claims, the question of the legal status of his bills will remain open for the court. Indeed, the first paragraph of his argument in his brief cites a decision from this court noting that we have an obligation to make an independent examination of the record as a whole in cases implicating the First Amendment. Appellant's Brief at 15 (citing *Liberty Lobby, Inc. v. Rees*, 852 F.2d 595, 598 (D.C. Cir. 1988) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-86, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964))). In the last paragraph of his brief he seeks, as an alternative to reversal and prompt return of his property, further proceedings with respect to the remaining materials. *Id.* at 32. Moreover, in its brief the government relied on the fact that this

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[1] *Stroup v. GSC Serv. Inc.*, 938 F.2d 20, 22 (2d Cir. 1991); *Bloomington Nat'l Bank v. Telrer*, 916 F.2d 1305, 1307 (7th Cir. 1990); *T.W. Elec. Serv. Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

court must "undertake its own independent analysis . . . of whether the bills in question are 'in the likeness of' or 'after the similitude' of genuine currency within the meaning of Criminal Code § 474" in maintaining that whether the district court viewed the bills in camera "is simply beside the point to the issue presented to this Court." Appellee's Brief at 12. In response, Boggs contended that the government has never demonstrated that each of the seized items is contraband per se. Reply Brief at 2.

Of course, Boggs might have stated his argument more clearly by explicitly requesting what he sought implicitly, but his failure to take the formal step of adding a sentence to his brief seeking a de novo examination by this court of, each sized item does not warrant the dispositive significance attached to it by the court. The court's rigid insistence on formality is particularly inappropriate here because in his complaint filed in the district court Boggs expressly challenged the government's "mistaken" interpretation of § 474, *see* Complaint at ¶ 21, and he sought a hearing before the district court to oppose the government's classification of his art as contraband. Given that this case involves government regulation—indeed, confiscation—of expressive materials, and that art may at times imitate reality,[2] this court is obliged on de novo review of the grant of summary judgment to look at the Boggs bills to determine if they meet the statutory criteria for counterfeit currency.[3]

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[2] Labeling a counterfeit bill "art" will not save it from the Secret Service's incinerator, but at some point, an artwork's loose resemblance to currency will not strip it of First Amendment protection. *Cf. Regan v. Time, Inc.*, 468 U.S. 641 (invalidating and upholding portions of § 474). Congress struck a balance between these extremes in § 474, and it falls to this court to determine whether, in the judgment of Congress, Boggs' art imitates reality too effectively.

[3] Our obligation is particularly clear in light of declarations from an art professor and a museum curator attesting to the artistic in-

Without viewing the bills, this court cannot determine for itself whether the district court correctly applied the law, or even if it applied the correct law. It is not sufficient to rely, as the court does, *see* opinion at 8, on the district court's recitation of the correct statutory standards. Elsewhere in its opinion, the district court described 18 U.S.C. § 474 as essentially objective, yet it appears to incorporate a substantial degree of subjectivity.[4] In addition, the district court's findings that a sponge and bow tie are in the "similitude" of actual currency raise questions about its statutory interpretation that warrant scrutiny on appeal.

Any doubt that reviewing the Boggs bills is appropriate should have been dispelled by the government's advocacy of the same result. In its brief, the government invited this court to review the bills, and it even brought its trove of confiscated art to the oral argument. Only at oral argument—after Boggs orally moved to supplement the record and the government saw the possibility of affirmance without exposing the Boggs bills to further judicial scrutiny—did the government retreat from its prior position of openness. Indeed, it is somewhat ironic that in an opinion that turns on the concept of waiver, the court ignores the government's repeated acceptance of the outcome that the court now deems Boggs to have foreclosed.

Moreover, reviewing the Boggs bills would not be arduous, at least not as the court suggests.[5] *See* opinion at 9.

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tegrity of Boggs' work. A third declaration, from a distinguished art historian, notes the historical pedigree of Boggs' decision to create images of money, and reminds us that since as early as 1886, the sensibilities of American artists and anti-counterfeiting authorities have collided.

[4] No one disputes that Boggs raised a timely challenge to the district court's interpretation of § 474.

[5] Of course, arduousness could hardly be determinative of this court's responsibility on de novo review.

If this court supplements the record, it would be in the same position as the district court, which rendered its decision after viewing the bills without conducting a hearing and apparently without relying on extraneous source material. The court's resolution of appellant's First Amendment claim characterizes § 474 as requiring relatively objective judgments that a law enforcement officer can make without need for an adversarial pre-seizure hearing before a magistrate. *See* opinion at 6. If § 474 is as easy to apply as the court says it is, there should be no difficulty in reviewing the Boggs bills without further argument from the parties. It may well be that Boggs focused on procedural claims rather than the merits of the district court's *in camera* review to postpone an affirmance that he may perceive as inevitable, but we will not know until we look.

The court's reliance on Fed. R. App. P. 28(a), see opinion at 9, is therefore insufficient to abrogate its obligation to review the Boggs bills de novo.[6] As this circuit has noted, Rule 28 does not automatically require ignoring issues that a party fails to present clearly in its brief. Rather, "substantial public interests" or the need to avoid an "unduly harsh" result justify relaxing traditional foreclosure principles. *Consumers Union v. Federal Power Comm'n*, 510 F.2d 656, 662 n. 10 (D.C. Cir. 1975). In such cases, a "balancing of considerations of judicial orderliness and efficiency against the need for the greatest possible accuracy in judicial decisionmaking" warrants appellate review of ostensibly waived issues. *Id.* at 662; *see also Columbia Gas Transmission Corp. v. FERC*, 844 F.2d 879, 880 (D.C. Cir. 1988).

Bcause this court is unable to review the district court's interpretation of § 474—which it purports to affirm—

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[6] The court has authority under Fed. R. App. P. 10(e) to supplement the record "on its own initiative."

without viewing the Boggs bills, I would grant Boggs' motion to supplement the record to include the confiscated Boggs bills and would view the bills in order to determine de novo whether they fall within the statutory definitions of counterfeit currency. Accordingly, I dissent from Part III(D) of the court's opinion.[7]

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[7] With respect to Boggs' claim that the district court erred by viewing the bills *ex parte*, I concur in the opinion of the court only to the extent that its relies on Boggs' failure to seek access to the bills during the district court proceedings. While the district court's procedure does not result in reversible error, it is impossible to characterize *ex parte* receipt of unknown materials not in the record as "insignificant." I also concur in the court's holding that *in camera* review was otherwise appropriate.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 93-1845 (RCL)

Filed October 29, 1997

J.S.G. BOGGS,

Plaintiff,

v.

LEWIS C. MERLETTI,[1] *et al.*

Defendants.

MEMORANDUM OPINION

This matter comes before the court on cross-motions for summary judgment on plaintiff's claim for the return of his seized property. Upon consideration of the parties' statements of points and authorities, affidavits, declarations and exhibits, and this court's *in camera* review of the property in dispute, plaintiff's motion for summary judgment is denied and defendants' motion for summary judgment is granted.

I. BACKGROUND

A. Factual Background

J.S.G. Boggs ("Boggs") is an artist and academic with an appointment at Carnegie-Mellon University whose

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[1] Under Fed. R. Civ. P. 25(d)(1), this court hereby orders the substitution of the current Director of the United States Secret Service as a defendant in this action.

greatest acclaim—in both the artistic and legal worlds—derives from his drawings of United States and foreign currency ("Boggs Bills"). Many of these reproductions are actual size, *trompe l'oeil* pieces on which Boggs alters some of the design elements from genuine bills, such as replacing the signature of the Secretary of the Treasury with his own, changing the portrait on the front, or creating a denomination that does not exist. Boggs travels the country bartering his work for goods and services by explaining to merchants that he is an artist. Affidavit of J.S.G. Boggs at 2-3. His chosen means of artistic expression has been the subject of substantial of media interest, including coverage in *The New York Times, The Washington Post* and *The London Times,* as well as NBC, CBS, ABC and PBS television.

The United States government has also taken an interest in Boggs' artistic pursuits, an interest which has been a source of significant consternation and frustration for him for almost all of this decade. The specific events relevant to this matter began in March 1991, when the Secret Service learned that Boggs was attempting to obtain merchandise from a Cheyenne, Wyoming K-Mart using one of his Boggs Bills. Declaration of Special Agent Jerry P. Henson at 2. Secret Service agents subsequently met with Boggs in his hotel room, and left this encounter with fifteen Boggs Bills samples. At that time Boggs was advised that the pieces appeared to be in violation of federal counterfeiting statutes. As of this date, the government has not returned the samples taken in Wyoming, alleging that they violate Chapter 25 of Title 18 of the U.S. Code and are contraband.

In November 1992, the Secret Service became aware that Boggs had printed $1 million in Boggs Bills and was planning on using them in the greater Pittsburgh area as part of "Project Pittsburgh," in which Boggs was planning

to ask people to spend the bills five times before taking them out of circulation. Affidavit of Thomas M. Abraham in Support of Application for Search Warrant at ¶ 17. In December of that year, pursuant to a warrant issued by the chief magistrate of the Western District of Pennsylvania, Secret Service agents conducted a search of Boggs' person, studio and residence, seizing a large quantity of Boggs Bills as well as hundreds of other items. In a December 8, 1992 meeting with the Secret Service, Boggs was advised that many of the seized items appeared to be in violation of counterfeiting statutes and that prosecution was a possibility. On March 3, 1995, the United States Attorney for the Western District of Pennsylvania declined to prosecute Boggs. *See* Letter from Charles F. Flynn, Assistant U.S. Attorney, to Kent Yalowitz, Esq. (April 14, 1995) ("Flynn Letter"). As of this date, the government has not returned the Boggs Bills taken in Pittsburgh, alleging that they are contraband, though they have offered to return other items (presumed to be non-contraband) taken in the seizure.

Plaintiff filed suit in September 1993, stating two claims for relief. In the first claim, plaintiff sought declaratory and injunctive relief, contending that the Secret Service's past actions and threatened prosecutions were causing him to suffer irreparable injury constituting a violation of his First Amendment rights. In *Boggs v. Bowron*, 842 F. Supp. 542 (D.D.C. 1993) ("*Boggs v. Bowron*"), *aff'd*, 67 F.3d 972 (D.C. Cir. 1995) (unpublished table decision) this court held that 18 U.S.C. §§ 474 and 504—the counterfeiting statutes which the Boggs Bills allegedly violate—were both facially constitutional and constitutional as applied to Boggs. *Id.* at 562. Defendants were awarded summary judgment as a matter of law. Plaintiff now asks this court to address the second claim for relief and order the Secret Service to return the Boggs Bills

seized in Cheyenne and Pittsburgh. The gravamen of Boggs' contention is that in executing these two seizures, the Secret Service failed to comply with the special procedural protections established for presumptively expressive materials. These protections include a more strictly applied warrant requirement and a right to a prior adversarial hearing on notice before an independent judicial officer. For the Secret Service's failure to comply with these protections, Boggs contends that the proper remedy is return of the items.

II. ANALYSIS

A. The Seizures Did Not Violate the Constitution

1. The Cheyenne "Encounter" Was Not a Seizure

Plaintiff claims that in the Cheyenne seizure, "the government acted without a warrant. Under *Roaden* [*Roaden v. Kentucky*, 413 U.S. 496, 504-05 (1973)], that ends the matter." Plaintiff's Statement of Points and Authorities at 9. This court does not agree that the constitutional analysis can be so summarily concluded. The validity of the government's conduct in Cheyenne first turns on whether the events that transpired in March 1991 constitute a Fourth Amendment "seizure" such that the warrant requirement is triggered. Consent is one of the major established exceptions to the warrant requirement, *see, e.g., Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973); *United States v. Lewis*, 921 F.2d 1294, 1300 (D.C. Cir. 1990). The possibility that both the entry into the hotel room and the seizure of the samples were done with Boggs' consent is implicated by both the government's and Boggs' depiction of the Cheyenne encounter.

According to plaintiff's Rule 108(h) Statement of Material Facts as to Which There is No Issue, ¶ 10, the authorities "appeared at Boggs' hotel room door without

a warrant. They left with fifteen pieces of Boggs' art." The court is asked to conclude from this two sentence description of the encounter and nothing else that an unconstitutional search and seizure occurred. The government, on the other hand, construes the initial appearance and entry of the agents as a "visit." *See* Defendants' Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment at 2. As to the taking of the sample reproductions of Boggs' work, the Secret Service contends that Boggs voluntarily handed over the samples. *Id.*

Even taking the two characterizations and all of the evidence before the court in the light most favorable to plaintiff, this court does not find that the events that transpired in Cheyenne constitute a Fourth Amendment seizure such that the warrant requirement was triggered. First, there is no indication from any of the materials offered in support of plaintiff's summary judgment motion that the government's initial entry into the hotel room was anything but consensual. In Boggs' complaint, he states only that the Secret Service "appeared at [my] hotel room door . . ." Plaintiffs Verified Complaint ¶ 11. The Secret Service, in describing the entry into the room, states, "[u]pon knocking on the door, identifying ourselves and explaining the purpose of our visit, Mr. Boggs invited us into his room." Declaration of Special Agent Jerry P. Henson at ¶ 7 ("Henson Declaration"). These two characterizations are not incompatible, let alone contradictory, as the Secret Service's description of their entry does include an "appearance" at the hotel room door. The fact that plaintiff has not offered any evidence that the agents' entry into the room was nonconsenual, or at all contrary to Agent Henson's portrayal, leads this court to conclude that there is no such evidence. The fact that Boggs may have been surprised or less than delighted by the Secret

Service visit at the moment of their arrival does not by itself implicate the Fourth Amendment warrant requirement. This court cannot hold, in the absence of at least some evidence to the contrary, that the Secret Service's entry into Boggs' Cheyenne hotel room was a nonconsenual entry requiring the agents to have previously obtained a warrant.

Having concluded that the entry into the room was consensual and did not trigger the Fourth Amendment warrant requirement, the second question to address is whether Boggs' relinquishment of the fifteen samples was also consensual. Boggs' complaint states that in response to their demand for his entire inventory of art, Boggs offered the agents a single example of each type of work. Verified Complaint at ¶ 11. After what Boggs describes as "several hours of tense negotiation, during which it appeared to Boggs that he would be arrested and prosecuted for the content of his art," the agents agreed to take only fifteen Boggs Bills samples. *Id.*

Agent Henson's description of what transpired diverges from Boggs' account:

> Boggs was asked if he had samples of his reproductions available in his room. He provided a quantity of reproductions that he obtained from a briefcase in his room. . . . Mr. Boggs was advised that the reproductions appear to be in violation of counterfeiting statutes and were subject to seizure. At no time during this visit was Mr. Boggs ever threatened with arrest. However, Mr. Boggs was requested to provide a general sampling of his bills and he subsequently gave fifteen samples of his reproductions.

Henson Declaration at ¶¶ 7-8. Based upon these conflicting accounts, there are two bases upon which this court concludes that the relinquishment of the Boggs Bills

did not constitute a Fourth Amendment seizure. It is true that coercion invalidates the consent exception for searches and seizures, *see e.g., Schneckloth*, 412 U.S. at 225-26 quoting *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961) ("if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process"). However, plaintiff has not pointed to any specific statement or conduct on the part of the Secret Service such that this court could conclude that the government obtained the samples through coercion. Plaintiff did state that he feared arrest, but he offers no basis whatsoever for that fear, an omission that is especially problematic in light of the fact that Agent Henson's sworn statement affirmatively indicates that Boggs was never threatened with arrest. Without any evidence of coercion, threatening statements, or hints of arrest, this court cannot conclude that the relinquishment of the fifteen samples was anything but consensual.

Second, none of the samples turned over to the Secret Service were the product of the alleged "several hours of tense negotiation." According to Boggs' chronology of the events in the Cheyenne hotel room, the Secret Service first demanded all of the Boggs Bills, but rather than absolutely denying their request and sending the agents away (an act which would have been within his right), he *offered* them "a single example of each type of work." Verified Complaint ¶ 11. It is undisputed that at the conclusion of the encounter in the hotel room, the government left with only the fifteen samples originally offered by Boggs—nothing more. In other words, rather than Boggs succumbing to the pressure of the Secret Service, the Secret Service succumbed to him. Even if there were several hours of tense negotiation during which Boggs was subjectively in fear of arrest, none of the Boggs Bills at issue

were obtained as a result of that "pressure." Since all the government took was that which Boggs offered at the outset, this court fails to see how the government's seizure could be characterized as the product of coercion.

Because this court finds that the Secret Service was in Boggs' hotel room with his permission, and that Boggs voluntarily provided the fifteen samples to the agents, this court holds that the Cheyenne encounter was not a Fourth Amendment seizure. The government's actions in March 1991 did not violate plaintiff's constitutional rights, as the entire Cheyenne encounter falls under the consent exception to the warrant requirement.

2. An Adversarial Proceeding on Notice was Not Required Prior to the Issuance of the Pittsburgh Warrant

The events that transpired in Pittsburgh do require this court to consider whether proper Fourth Amendment procedural safeguards were followed prior to the seizure of Boggs' presumptively expressive materials.[2] In Pittsburgh, the Secret Service obtained warants for Boggs' residence, person and studio; there is no dispute that both a "search" and a "seizure," as those terms are commonly understood, occurred. The question for this court is whether the magistrate's authorization of the warrant afforded the proper rigorous procedural protections and was based on sufficient information so as to ensure against the unjustified suppression of legitimate First Amendment speech.

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2 In *Boggs v. Bowron*, this court held that the Boggs Bills were expressive materials, presumptively protected by the First Amendment. *Boggs v. Bowron*, 842 F. Supp. at 551. That holding is "law of this case" for this analysis, and this court will proceed under the presumption that "Mr. Boggs has a First Amendment right to create illustrations of United States currency absent constitutionally permissible overriding considerations." *Id.*

When the subject matter of a search is expressive material, the potential for a seizure to act as a *de facto* prior restraint of that speech requires a more searching inquiry before issuing a warrant. "Thus, while it is the general rule under the Fourth Amendment that any and all contraband, instrumentalities and evidence of crimes may be seized on probable cause, it is otherwise when materials presumptively protected by the First Amendment are involved." *Fort Wayne Books v. Indiana*, 489 U.S. 46, 63 (1989) (recognizing the risk of prior restraint); *see also Roaden v. Kentucky*, 413 U.S. 496, 501 (1973) ("A seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material."); *Marcus v. Search Warrant*, 367 U.S. 717 (1961).

Plaintiff contends that for the government to seize his art *en masse*, as occurred in Pittsburgh, the government was required to first secure judicial approval in an adversary hearing on notice. As authority for this proposition, plaintiff cites *Fort Wayne Books*, 489 U.S. at 63. However, this court finds that the concerns triggering the need for the pre-seizure adversary hearing in that and similar cases are not present in the Pittsburgh seizure.

Fort Wayne Books, along with *Roaden*, *Heller v. New York*, 413 U.S. 483 (1973), *Huffman v. United States*, 470 F.2d 386, 392 (D.C. Cir. 1971) and the other cases cited in support of plaintiff's argument that additional process is demanded for warrants covering expressive materials have one common thread—they are obscenity cases. The probable cause determination in such cases centers around whether the subject of the potential seizure violates an obscenity statute. This court agrees that obscenity cases do provide a good starting point for the analysis that the court is undertaking here, as they present the paradigm situation in which presumptively expressive

materials are routinely seized, raising the specter of prior restraints and censorship pending prosecution.

The analogy is not a perfect one, however. The rationale behind requiring special procedures (such as *in camera* review or adversary hearings on notice) before authorizing a seizure pursuant to an obscenity statute is that a determination as to whether a photo, film or book is obscene (and therefore unprotected) versus only pornographic (and therefore protected) is inherently *subjective*. "Because the line between protected pornographic speech and obscenity is dim and uncertain, a State is not free to adopt whatever procedures it pleases for dealing with obscenity, but must employ careful procedural safeguards to assure that only those materials adjudged obscene are withdrawn from public commerce." *Fort Wayne Books*, 489 U.S. at 79 (citations omitted); *see also Roth v. United States*, 354 U.S. 476, 488, 491 (1957) (recognizing the complexity inherent in determining whether materials are obscene). "The line between speech unconditionally guaranteed and speech which may be legitimately regulated, suppressed or punished is finely drawn. The separation of legitimate from illegitimate speech calls for . . . sensitive tools." *Marcus*, 367 U.S. at 730-31. If obscenity seizures were to be authorized on nothing more than an officer's affidavit, the affiant would have substantial, if not exclusive power to make the difficult determination as to whether the material in question taken as a whole, appeals to the prurient interest in sex, or portrays in a patently offensive way, sexual conduct specifically defined by the applicable state law. *Miller v. California*, 413 U.S. 15 (1973). For a magistrate or other judicial officer to make a probable cause determination based merely on the bald affidavit of a police officer presents too much of a possibility that the subjective impression of that police officer will act as a prior restraint on protected speech.

It is the evaluative aspect and sensitivity inherent in making an obscenity determination that requires a magistrate to have more than the officer's word at his or her disposal. "When presumptively protected materials are sought to be seized, the warrant requirement should be administered to leave as little as possible to the discretion or whim of the officer in the field." *Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978).

The difficulty encountered in determining whether materials are obscene is not present when determining whether materials might violate counterfeiting statutes. While an obscenity determination requires *evaluation*, a counterfeiting determination requires only *observation*. The seizures in the instant case were executed based upon potential violations of Chapter 25 of Title 18 of the United States Code. To make a finding of probable cause that the relevant statutes were being violated, the issuing magistrate needed to be convinced of only three facts: 1. that the bills were made or executed in whole or in part after the similitude of United States obligations, 18 U.S.C. § 474 para. 5; 2. that the bills were color reproductions, 18 U.S.C. § 504(1); and, 3. that they were more than three-fourths or less than one and one-half the size of actual United States currency, *id.* No "subjective" determinations were required—all the factors can be established with the naked eye. Any law enforcement officer—or even a lay person—who has average familiarity with United States currency could make the necessary observaitons of similarity, size and color to conclude that Boggs Bills potentially violate the counterfeiting statutes at issue. The concern underlying the additional process for obscenity warrants—that a law enforcement officer will use his or her own internal definition of "prurient interest" or "patently offensive" to restrain speech based upon a mere dislike of the speech—is practically nonexistent here. The

criteria that renders something as counterfeit does not require reaching a legal conclusion, but rather a factual one. When a determination can be made entirely on observation rather than evaluation, the traditional warrant requirement is sufficient, even when presumptively protected materials are at issue.

Perhaps the most apt analogy to the instant case is not obscenity seizures, but rather warrants issued in child pornography cases where a determination of potential violations of applicable law can be made on the basis of more observation. The courts have held that probable cause determinations in the child pornography area can be made solely on the basis of affidavits even though potentially expressive speech could be restrained when the affiant is wrong. "Identification of visual depictions of minors engaging in sexually explicit conduct, in comparison [to the legal determination as to whether materials are obscene], is a factual determination that leaves little latitude to the officers." *United States v. Kimbrough*, 69 F.3d 723, 727-28 (5th Cir. 1995); *United States v. Koelling*, 992 F.2d 817, 822 (8th Cir. 1993) (noting that while there is some chance of a mistaken seizure, generally, "most minors look like minors and most adults look like adults, and most of the time most law enforcement officers can tell the difference."); *United States v. Smith*, 795 F.2d 841 (9th Cir. 1986). The child pornography holdings demonstrate that courts do not require more rigorous procedural safeguards or an adversarial hearing prior to seizure when law enforcement officers have objective and non-evaluative criteria by which to make their determinations. Similarly, in order to demonstrate probable cause in support of the Boggs warrant, all that had to be ascertained was that the bills were in the likeness of United States currency, that they were in color, or that they were of an impermissible size. Such objective criteria obviate the necessity for any-

thing more than the standard Fourth Amendment inquiry required for issuance of a warrant.

Substantial deference is given to a magistrate's determination that probable cause exists. *Massachusetts v. Upton*, 466 U.S. 727, 733 (1984); *United States v. Vaughn*, 830 F.2d 1185, 1187 (D.C. Cir. 1987); *United States v. Desantis*, 802 F. Supp. 794, 803 (E.D.N.Y. 1992) (noting that a magistrate's finding of probable cause is in and of itself a factor tending to uphold the validity of a warrant). It is this court's conclusion that the information contained in Secret Service Agent Thomas Abraham's Affidavit in Support of Application for Search Warrant ("Abraham Affidavit") provided a legally sufficient basis for the magistrate to issue the warrant authorizing the Pittsburgh search and seizure. In a November 20, 1992 conversation, Boggs admitted to Abraham that, pursuant to "Project Pittsburgh," he had printed $1 million of Boggs Bills and that he would circulate them in Pittsburgh over the next two years. Abraham Affidavit ¶ 17. Having seen Boggs Bills before—specifically, the fifteen Boggs Bills taken in Wyoming—Abraham was able to conclude that they were "sufficiently similar to genuine bills that they satisfy the test of similitude" in violation of 18 U.S.C. § 474 para. 5, that they were color reproductions, and that they were approximately the same size as genuine bills, in violation of 18 U.S.C. § 474, para. 6 and 18 U.S.C. § 504 (printing of photographic likenesses). Abraham Affidavit ¶ 18. This court also holds, based on the above analysis, that the affidavit was, by itself, a legally adequate basis upon which the magistrate could make the probable cause determination. As the warrant was supported by probable cause and did not require additional procedural protections prior to its issuance, this court holds that the Pittsburgh seizure did not violate plaintiff's First Amendment rights.

Finally, in challenging the validity of the Pittsburgh seizure, Boggs takes issue with the quantity of Boggs Bills seized, arguing that the Secret Service should have only taken the one or two samples needed for evidentiary purposes. Boggs points to *Huffman*, 470 F.2d at 392, and *Fort Wayne Books*, 489 U.S. at 63 in support of the proposition that only a single copy of an expressive item should be seized for the purpose of preserving it as evidence for a criminal prosecution. *See also Heller v. New York*, 413 U.S. 483, 492 (1973). This court concludes that plaintiff's analogy to these cases misses an important distinction between the instant case and the obscenity seizures. A court can properly perform its evaluative function as to whether a given book, film or photograph is obscene with just one or two copies of the suspect material. If other copies exist, the First Amendment dictates that those copies should remain available to the public pending a judicial determination of illegality. In this case, however, each Boggs Bill is sufficiently unique such that individual judicial determinations are required as to whether each one violates the relevant counterfeiting statutes. A review of just a "sample" bill could potentially result in an overbroad determination that all of Boggs' work "in the image of money" violates 18 U.S.C. § 474 and is therefore contraband, even if that is not actually the case. The closer analogy to the obscenity area would be if a bookstore sold several allegedly obscene books or if a theater was showing multiple allegedly obscene movies at one time. In such a case, a seizure could include one copy of each of the suspect items and not contravene the First Amendment, provided that the warrant described the areas to be searched and items to be seized with sufficient particularity. Because the Boggs Bills are sufficiently unique such that individual determinations of their legality must be made, the Secret Service was within its right to seize all of the Boggs Bills,

and this court will not apply the *Fort Wayne Books* rule for mass seizures in a context in which it is rationale cannot properly be applied.

C. Boggs' Claim for the Return of the Boggs Bills

Plaintiff's rationale for challenging the above seizures is that he seeks return of the items currently held by the Secret Service. Boggs accurately notes that the proper remedy for the unconstitutional seizure and retention of property is return of the material. *Huffman*, 470 F.2d at 392; *United States v. Pryba*, 502 F.2d 391, 404 n.97 (D.C. Cir. 1974). Having now determined that neither the Cheyenne nor the Pittsburgh seizures were improperly authorized or violative of plaintiff's constitutional rights, Boggs may not claim entitlement to the return of the seized items on that basis.

This court nonetheless elects to address plaintiff's claim for the return of the Boggs Bills. "The general rule is that seized property, other than contraband, should be returned to its rightful owner once the criminal proceedings have terminated." *United States v. Farrell*, 606 F.2d 1341, 1343 (D.C. Cir. 1979) (quoting *United States v. LaFalch*, 565 F.2d 81, 83 (6th Cir. 1977); *see also Cooper v. City of Greenwood*, 904 F.2d 302, 304 (5th Cir. 1990). Because the government has declined to prosecute plaintiff in either the District of Wyoming or the Western District of Pennsylvania, the criminal proceedings are effectively terminated, and Boggs has a right (subject to the qualifications described below) to make a claim for the return of his goods.[3] Furthermore, the length of time that

[3] To the best of this court's knowledge, plaintiff has not filed a motion pursuant to Federal Rule of Criminal Procedure 41(e) for the return of his property in either the District of Wyoming or the Western District of Pennsylvania. As the government has not challenged plaintiff's bringing his claim for the return of the seized

has elapsed betwen the seizures and the government's final decision not to prosecute—almost two years—mitigates in favor of plaintiff's claim for the return of his goods. *See Eckstein v. Cullen*, 803 F. Supp. 1107, 1116 (E.D. Va. 1992) (noting that the duration of a seizure implicates the First Amendment when expressive materials are at issue); *United States v. Premises Known as 608 Taylor Avenue, Apartment 302*, 584 F.2d 1297, 1302 (3d Cir. 1978) (stating that the government can retain possession for only a reasonable time).

Whether or not Boggs is entitled to the return of his art turns on this court's determination as to whether the Boggs Bills are contraband. Individuals have no property right in contraband materials and contraband materials may not be returned to them. *United States v. Jeffers*, 342 U.S. 48, 52 (1951); *Trupiano v. United States*, 334 U.S. 699, 710 (1948). Notably, this is true whether or not the initial seizure of the property was improper, and whether or not any person connected with the seizure has been convicted of a crime. *Id.*

Contraband is divided into two types. The first is "contraband *per se*," which are objects that are inherently unlawful to possess, such as cocaine and other illegal narcotics. "[O]ne cannot have a property right in that which is not subject to legal possession." *City of Greenwood*, 904 F.2d at 304-05. For contraband *per se*, no forfeiture action need be filed for the government to retain the items; the government owns the items upon seizure. *United States v. 37.29 Pounds of Semi-Precious Stones*, 7 F.3d 480, 485 (6th Cir. 1993).

Derivative contraband, on the other hand, are items that are not inherently unlawful but become unlawful

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items in this court, this court will operate under its equitable power in determining whether the property should be returned.

based upon the use(s) to which to which they have been put. An automobile used in furtherance of a felony is the paradigm example of derivative contraband. *See, e.g., One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699-700 (1965). Derivative contraband may only be forfeited pursuant to a statute, and such statutory forfeitures require notice and an opportunity to be heard. *See Degen v. United States*, 116 S. Ct. 1777, 1780 (1996); *United States v. James Daniel Good Real Property*, 510 U.S. 43, 48-62 (1993). Absent statutory authority for the forfeiture of derivative contraband, it must be returned, as there is no authority for the continued detention of the item by the government. *United States v. Wilson*, 540 F.2d 1100, 1104 (D.C. Cir. 1976). Statutory authorization for the forfeiture of counterfeit paraphernalia is found in 18 U.S.C. § 492.

Consequently, the question that must be resolved is as to whether the Boggs Bills[4] are either contraband per se, derivative contraband or non-contraband. In *Boggs v. Bowron*, this court expressly stated that "[n]o determination has been made as to whether any items within the portfolio [the samples from Wyoming] constitute contraband." *Boggs v. Bowron*, 842 F. Supp. at 561 n.42 At that time, such a decision would have been premature, as no final determination has been reached as to whether plaintiff would be prosecuted. Now that the United States Attorney has decided not to prosecute in either jurisdic-

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[4] The government has already agreed to return all of the "non-contraband" items seized in Pittsburgh. *See* Letter from Charles F. Flynn, Assistant United States Attorney, to Kent A. Yalowitz, Esq. (April 14, 1995). Plaintiff's counsel, on the other hand, is "of the view that all of the property seized must be viewed as a whole in any civil forfeiture action . . ." Letter from Kent A. Yalowitz to Charles F. Flynn (March 9, 1995). As the only item(s) contested in this action are the Boggs Bills that the Secret Service claims are contraband, the court will limit its analysis to those items.

tion, the court will consider whether the Boggs Bills are contraband and therefore automatically forfeited to the government, or should be returned to the plaintiff. For reasons that will become apparent below, this court will analyze the samples seized in Cheyenne separately from those seized in Pittsburgh.

1. The Cheyenne Boggs Bills

In *Boggs v. Bowron*, this court had the opportunity to examine the fifteen samples that Boggs relinquished in Wyoming. The court found that those Boggs Bills were in "the general pattern of general currency, including portraits in the middle, federal reserve seals and numbers, treasury seals and numbers, signature blocks and numeric features, in the size and color similar to genuine currency." *Boggs v. Bowron*, 842 F. Supp. at 561. The court further concluded "that a jury would be justified, if not compelled, to find that these items were in the likeness and similitude of genuine United States currency." *Id.*

These conclusions from *Boggs v. Bowron* are binding on the court in the instant case. Having determined that a jury would be compelled to find that the fifteen Cheyenne Boggs Bills violate 18 U.S.C. § 474, para. 5, which proscribes the possession or custody of items made or executed after the similitude of United States obligations, the court must now rule that those bills are contraband *per se*. Counterfeit bills are among the most obvious forms of contraband as their mere possession, without more, is unlawful. *See 37.29 Pounds of Semi-Precious Stones*, 7 F.3d at 485. The instant case is precisely the type of situation that the contraband *per se* forfeiture rule is intended to address. If mere possession of an item is a crime, the government's return of that item would make the recipient a criminal, and a court cannot enter an order that would lead to such a result.

Based upon its factual conclusions from *Boggs v. Bowron*, this court must now hold that the fifteen Boggs Bills seized in Cheyenne are contraband *per se*. Consequently, they are hereby forfeited to the United States without forfeiture procedures.

2. The Pittsburgh Boggs Bills

This court may not rely on the holding in *Boggs v. Bowron* to conclude that the Boggs Bills[5] seized in Pittsburgh are contraband, as these bills had not been previously examined by this court. As explained in Part II.A.2., the Boggs Bills are sufficiently unique such that individual determinations as to whether they violate 18 U.S.C. §§ 474, 481, 504 and 31 C.F.R. § 411.1 are required. The Secret Service contends that this court's examination of the seized items "would lead the Court to conclude from its own observation that the reproductions are in the likeness and similitude of genuine United States currency." Defendants' Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment at 4. Defendants, in their briefing of this matter, "invited" this court to examine the Boggs Bills and rule on the basis of its own observations. The court "accepted" this "invitation," and conducted an *in camera* review of all of the Pittsburgh materials on October 23, 1997.

Having examined all of the disputed Boggs Bills seized in Pittsburgh (Exhibits B, C, and D from Defendant's In Camera Submission and Declaration of Counterfeit Spe-

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[5] A few of the items seized in Pittsburgh were not actual "bills", but rather "novelty items," including calculators, air fresheners and a bow tie. These items were also inspected to determine whether they violated the applicable counterfeiting statutes. For the purpose of convenience, they will be referred to under the general heading of "Boggs Bills."

cialist Richard L. Outland), this court concludes that all of the items that the Secret Service contends are contraband are, to this court's satisfaction, reproductions of genuine currency of the United States or reproductions of genuine foreign currency. Each are in the likeness and similitude of genuine currency and therefore in violation of 18 U.S.C. §§ 472 or 481. Each reproduction has the general design and appearance of genuine United States or foreign currency. None of the pieces in dispute meet the size and coloration exemptions of 18 U.S.C. § 504 and 31 C.F.R. 411.1. This court is therefore compelled to hold that items 1, 2 and 56 of the 81 reproductions of item 5 in Exhibit B are contraband; that items 1, 2, 3, 4, 5, and 6 in Exhibit C are contraband; and that items 1, 4, 5, 8, 13-16, 18, 19, 22-24 and the novelty items (except the oversize $2 note) from Exhibit D are contraband. These items are therefore forfeited to the United States without the necessity of forfeiture procedures.

A separate order shall issue this day.

/s/ Royce C. Lamberth
ROYCE C. LAMBERTH
United States District Judge

DATE: 10-29-97

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-5313

Filed February 3, 1999

J.S.G. BOGGS,

Appellant

v.

ROBERT E. RUBIN, Secretary of the Treasury, *et al.*,

Appellees

BEFORE: Ginsburg, Sentelle and Rogers, *Circuit Judges*

ORDER

Upon consideration of appellant's petition for rehearing filed December 14, 1998, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:

MARK J. LANGER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

APPENDIX D

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment provides in part:

   Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

2. The Fifth Amendment provides in part:

   No person shall be . . . deprived of life, liberty, or property without due process of law . . . .

3. 18 U.S.C. § 474(a) (1994 & Supp. II 1996) provides in part:

   § 474. Plates or stones for counterfeiting obligations or securities

   (a) * * * *

   Whoever has in his possession or custody, except under authority from the Secretary of the Treasury or other proper officer, any obligation or other security made or executed, in whole or in part, after the similitude of any obligation or other security issued under the authority of the United States, with intent to sell or otherwise use the same; or

   Whoever prints, photographs, or in any other manner makes or executes any engraving, photograph, print, or impression in the likeness of any such obligation or other security, or any part thereof, or sells any such engraving, photograph, print, or impression, except to the United States, or brings into the United States, any such engraving, photograph, print, or impression, except by direction of some proper officer of the United States—

Is guilty of a class B felony.[1]

4. 18 U.S.C. § 504 (1994 & Supp. II 1996) provides in part:

> **§ 504. Printing and filming of United States and foreign obligations and securities**
>
> Notwithstanding any other provision of this chapter, the following are permitted:
>
> (1) the printing, publishing, or importation, or the making or importation of the necessary plates for such printing or publishing, of illustrations or—
>
> (A) postage stamps of the United States,
>
> (B) revenue stamps of the United States,
>
> (C) any other obligation or other security of the United States, and
>
> (D) postage stamps, revenue stamps, notes, bonds, and any other obligation or other security of any foreign government, bank or corporation.
>
> Illustrations permitted by the foregoing provisions of this section shall be made in accordance with the following conditions—
>
> (i) all illustrations shall be in black and white . . . ;
>
> (ii) all illustrations . . . shall be of a size less than three-fourths or more than one and one-half, in linear dimension, of each part of any matter so illustrated which is covered by

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[1] A Class B felony is punishable by up to 25 years in prison. 18 U.S.C. § 3581(b)(2).

subparagraph (A), (B), (C), or (D) of this paragraph . . . ; and

(iii) the negatives and plates used in making the illustrations shall be destroyed after their final use in accordance with this section.

The Secretary of the Treasury shall prescribe regulations to permit color illustrations of such currency of the United States as the Secretary determines may be appropriate for such purposes.[1]

* * * *

[1] Regulations promulgated at 31 C.F.R. Part 411 permit color illustrations of money so long as the size limitations of 18 U.S.C. § 504 are met.

Supreme Court, U.S.
FILED
JUL 6 1999
CLERK

No. 98-1785

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

J.S.G. BOGGS,

Petitioner,

v.

ROBERT E. RUBIN, BRIAN L. STAFFORD, and JANET RENO,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF AMICI CURIAE OF THE ANDY WARHOL FOUNDATION FOR THE VISUAL ARTS, THE ART INSTITUTE OF CHICAGO, AND THE MUSEUM OF MODERN ART IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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July 1, 1999

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IN THE

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PRELIMINARY STATEMENT

This brief is respectfully submitted on behalf of the Andy Warhol Foundation for the Visual Arts, the Art Institute of Chicago, and the Museum of Modern Art, as *amici curiae* in support of the petition for a writ of certiorari filed by petitioner J.S.G. Boggs. Pursuant to Rule 37(2)(a) of the rules of this Court, *amici* have obtained and filed the written consents of the parties to the filing of this brief.

The Petitioner, J.S.G. Boggs, is an academic and artist whose artwork focuses on money and its role in society. He is by no means the first artist to do so. Many artists, both past and present, have created trompe l'oeil pictures of currency.[1] Examples of their works are annexed to this brief.

Unlike his artistic peers, however, Boggs' artwork has been seized by the United States Government as contraband. This was done without any of the procedural protections required by the First Amendment with respect to expressive materials and affirmed in an opinion of the Court of Appeals for the District of Columbia which concluded that works that are suspected of being obscene are entitled to a level of First Amendment protection that is higher than that afforded to art works said to constitute contraband. The result below is a frontal assault on well-established First Amendment rights, and the questions presented by the certiorari petition are of profound constitutional importance well-deserving this Court's review. Supreme Court Rule 10(c); *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46, 53 (1989) (granting certiorari petition because of "substantial constitutional issues raised by the pretrial seizure").

INTEREST OF AMICI CURIAE

Amici are art institutions with a strong commitment to supporting creative expression and to assuring that such expression is fully protected under the First Amendment to the United States Constitution.

The **Andy Warhol Foundation for the Visual Arts** is the principal beneficiary of the estate of Andy Warhol, who is recognized as one of the most important and influential artists

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[1] "Trompe l'oeil" is a French expression that means "fool the eye." *Boggs* v. *Bowron*, 842 F. Supp. 542, 544 n.7 (1993) (reprinted in joint appendix to the United States Court of Appeals for the District of Columbia Circuit in *Boggs* v. *Rubin*, No. 97-5313, at A-56, n.7) (hereinafter "jt. app. at A-__").

of the 20th Century. Since 1990, the Foundation has curated, catalogued, and provided art-professional storage for over 100,000 paintings, drawings, prints, and photographs, as well as video and film material created by Warhol. Through financial grants supporting contemporary art, as well as its promotional and organizational efforts, the Foundation is a leading organization for the advancement of the visual arts.

The **Art Institute of Chicago** is an Illinois not-for-profit corporation founded in 1879. One of the country's oldest artistic institutions, it is engaged in the maintenance of Schools of art and design, the formation of exhibitions and collections of objects of art, and the cultivation and extension of the arts to the general public through its City of Chicago Grant Park campus.

The **Museum of Modern Art**, dedicated to being the foremost modern art museum in the world, was founded in 1929 as an educational institution. The museum establishes, preserves, and documents a permanent collection of the highest order that reflects the vitality, complexity, and unfolding patterns of modern and contemporary art; presents exhibitions and educational programs of unparalleled significance; sustains a library, archives, and conservation laboratory that are recognized as international centers of research; and supports scholarships and publications of preeminent intellectual merit.

SUMMARY OF ARGUMENT

Given its prominent role in society, politics, and culture through the ages, it is not surprising that money has often been the focus of artistic expression. Boggs' artwork about currency is a contemporary manifestation of a long and well-established tradition of trompe l'oeil artwork that has existed in this country for over 100 years. Examples of that work are annexed to this brief.

This important area of First Amendment-protected artistic expression is gravely threatened by the lower courts' sanctioning of the Government's wholesale seizure of Boggs' artwork without *any* of the procedural protections afforded expressive materials as set forth by this Court's precedents. *See, e.g., Marcus* v. *Search Warrants*, 367 U.S. 717 (1961); *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46 (1989). Here, there is no question that "an effective restraint— indeed the most effective restraint possible—was imposed" (*Marcus*, 367 U.S. at 736) upon Boggs prior to any hearing on the critical question of whether his artwork met the necessarily subjective criteria for contraband set forth by the counterfeiting statutes. This conduct is at odds with deeply rooted First Amendment principles.

ARGUMENT

I. THERE IS A STRONG TRADITION OF TROMPE L'OEIL WORKS OF ART INVOLVING CURRENCY

Boggs' artwork—actual-sized trompe l'oeil images of currency—builds upon a long line of artists who have also focused on money as the subject of their art. Indeed, there is an entire school of trompe l'oeil currency painting that first emerged in the 19th century.

Bruce W. Chambers, an art historian who holds a Ph.D. in Art History from the University of Pennsylvania, has written extensively about the 19th century school of trompe l'oeil painting. Chambers submitted an affidavit in the district court in which he explained the artistic roots of Boggs' work:

> "Practiced by important artists such as William Michael Harnett, John Haberle, John F. Peto, Nicholas A. Brooks, Victor Dubreuil, and Otis Kaye . . . this school of painting employed depictions of currency as a vehicle for commenting on social and political issues of the day,

> many of which focused on monetary policy and paper money itself. The work of J.S.G. Boggs is a direct descendant of these earlier works, and a complete appreciation of his art is possible only if one understands the political, cultural, and artistic tradition in which his work is firmly rooted."

(Chambers Aff. ¶4; jt. app. at A-137)[2] Chambers then explained the historical development of paper money and a national banking system after the Civil War, all of which led to "the rise of Populism, the Free Silver Movement, and the acrimonious presidential campaign in 1896, best exemplified by William Jennings Bryan's famous 'Cross of Gold' speech assailing monometallism and the special interests who supported it." (Chambers Aff. ¶5; jt. app. at A-138-39).

Chambers further explained:

> "In the context of this fundamental division in American society over conceptions of democracy, wealth, commerce, banking, and the proper relation of the federal government to each, artists such as Harnett and Dubreuil seized upon currency as the quintessential emblem of the social and political landscape. These artists—themselves squarely within the dual European traditions of money painting (dating to the Renaissance) and still lifes—communicated their ideas by means of

---

[2] In her dissenting opinion, Judge Rogers noted the evidence in the record supporting Boggs' artistic credentials: "Our obligation [to review the Boggs bills] is particularly clear in light of declarations from an art professor and a museum curator attesting to the artistic integrity of Boggs' work. A third declaration, from a distinguished art historian [Chambers], notes the historical pedigree of Boggs' decision to create images of money, and reminds us that since as early as 1886, the sensibilities of American artists and anti-counterfeiting authorities have collided." *Boggs* v. *Rubin*, 161 F.3d 37, 43 n.3 (1998) (Rogers, J., concurring in part and dissenting in part), reprinted in appendix to certiorari petition at 12a-13a (hereinafter "cert. petn. at __").

> elaborate visual puns and allusive inclusions. . . ." (Chambers Aff. ¶ 6; jt. app. at A-139)
>
> "Significantly, all of these artists played upon the twinned concepts of value and worthlessness not only by painting particular types of notes, but also by frequently incorporating into their work subtle changes to distinguish their 'bills' from genuine currency. . . ." (Chambers Aff. ¶ 7; *Id.*)

Chambers examined Boggs' artwork as compared to this tradition of trompe l'oeil currency paintings. He stated as follows:

> "The work Boggs undertakes lies in direct line with that of Harnett, Haberle, Dubreuil, and others. Like his predecessors, Boggs appropriates one of the most common tokens of every citizen's daily life—paper money—and draws upon the item's symbolism even as he comments on money itself and the social function it serves. Also like his forebears, Boggs incorporates significant variations into his bills, variations that serve not only to reinforce that the work is *not* that of a deceitful copyist (however skillful), but also to communicate additional ideas (and provoke thoughtful reaction) about the interrelationships among money, ordinary people, art, value, and governmental power. . . ." (Chambers Aff. ¶ 10; jt. app. at A-141)

Chambers also explained that Boggs builds upon the work of his predecessors by adding a new dimension to the trompe l'oeil experience:

> "Boggs, however, takes the dialogue with his viewer *qua* consumer one step beyond the work of Harnett *et al.* In approaching ordinary people to propose the barter of his art for goods or services, Boggs engages in an active dialogue with his audience, one individual at a time. The discussions that result—focusing on art as a commodity,

> on relative (or communal) conceptions of value, and on the artist's inevitable dislocation of the item depicted from the original—represent a more externalized version of the mental processes experienced by the audiences of Dubreuil and Harnett." (Chambers Aff. ¶ 11; jt. app. at A-142)

Another expert witness, Roger Mayer—the Chair of the Department of Visual Arts at Brown University—used similar words to describe Boggs' artistic works and their contribution to society. Professor Mayer attested as follows:

> "Based upon this first-hand familiarity with Boggs and his work, I believe that his money paintings communicate important ideas. Boggs engages his audience with a special kind of wit and humor, as evidenced by the many distinctive puns and allusions embedded in his 'bills.' Having thus entered into a conversation with the audience, Boggs assists his audience in exploring ideas relating to art as a medium of exchange and to the core notion of what is 'real' as opposed to fake, inauthentic, or valueless. In so doing, Boggs straddles one of the great modern philosophical divides. On one hand is Heidegger (and indeed, all descendants of Platonic thought), who posits the existence of the absolutely authentic original—in effect, what other thinkers have referred to variously as the *Ding an sich* ("thing in itself") or the *noumenon* (the Platonic ideal, contrasted with the *phenomenon*, or specific instance of the Ideal). On the other side lie the post-modernists such as Baudrillard, Derrida, and Foucault who, like Immanuel Kant before them, reject the philosophical notion of an unassailable, objectively determinable Ideal." (Mayer Aff. ¶ 5; jt. app. at A-129-30)

Other contemporary artists, like Boggs, have continued the tradition of using trompe l'oeil images of money in their artwork. For example, Andy Warhol often depicted realistic

images of currency in his artwork, such as "Two Dollar Bill with Jefferson," and "Ten Dollar Bill." (*See* Appendix at A-11 and A-12) Warhol's works also included mass reproductions of images of currency, such as that seen in "Eighty Two-Dollar Bills." (*See* Appendix at A-15)

Collected in the Appendix is a compendium of works from artists through the ages who have created trompe l'oeil images of currency in their artwork. These artists include the following:

- William Michael Harnett
- John Haberle
- Thomas H. Hope
- Peter McCallion
- Nicholas A. Brooks
- Victor Dubreuil
- Otis Kaye
- Andy Warhol
- Robert Watts
- David Wojnarowicz

These artists' work ranges from technical studies of modern bills (*e.g.*, the works of Andy Warhol and Robert Watts at A-11 through A-17), to collages involving images of the front and back of bills (*e.g.*, David Wojnarowicz at A-18), to detailed depictions of 19th century bills (*e.g.*, the works of William Michael Harnett, Thomas H. Hope, and John Haberle at A-1 through A-4). The currency artwork from the 19th century includes Victor Dubreuil's "The Cross of Gold," which played upon the famous "Cross of Gold" speech by presidential candidate William Jennings Bryan in 1896. (*See* Appendix at A-7)

Thus, far from serving as some sort of pretextual mechanism to distribute contraband, Boggs' artwork follows and

builds upon the tradition of trompe l'oeil currency paintings that has existed in this country for over 100 years. The lower courts' countenance of the seizure of Boggs' artwork, without any of the protections afforded by the First Amendment, is a direct threat to artistic freedom protected by the First Amendment and is well-deserving of this Court's plenary review.

II. TO INCINERATE EXPRESSIVE WORKS OF ARTISTS WITHOUT PROCEDURAL SAFEGUARDS VIOLATES THE FIRST AMENDMENT

In a long line of cases, this Court has set forth special procedural protections that must be followed prior to the seizure of expressive materials presumptively protected by the First Amendment. *See, e.g., Marcus* v. *Search Warrants*, 367 U.S. 717 (1961); *Quantity of Copies of Books* v. *Kansas*, 378 U.S. 205 (1964); *Roaden* v. *Kentucky*, 413 U.S. 496 (1973); *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46 (1989).

In *Marcus*, this Court examined state procedures by which thousands of books, magazines and photographs were seized on the basis of their alleged obscenity. Among other things, the property owner was not afforded a hearing as to the alleged obscenity of the materials prior to issuance of the search warrants. 367 U.S. at 719-20. The Court held that the procedures "lacked the safeguards which due process demands to assure nonobscene material the constitutional protection to which it is entitled," *id.* at 731, and in particular faulted that "there was no step in the procedure *before seizure* designed to focus searchingly on the question of obscenity." *Id.* at 732 (emphasis added).[3] In reaching its decision, the

[3] It is noteworthy that *Marcus*, like the instant case, addressed a procedural challenge. 367 U.S. at 723. Many cases setting forth important First Amendment protections have arisen in the context of procedural challenges. *See, e.g., Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 561 (1975) (holding unconstitutional a city's licensing system and noting that "[i]nsistence on rigorous procedural safeguards under these

Court rejected the lower court's "assimilation of obscene literature to gambling paraphernalia or other contraband" (*id.* at 730) because of the First Amendment implications of the former:

> "[T]he use of these warrants [as compared to those involving, *e.g.*, "all intoxicating liquors"] implicates questions whether the procedures leading to their issuance and surrounding their execution were adequate to avoid suppression of constitutionally protected publications. '[T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn . . . *The separation of legitimate from illegitimate speech calls for . . . sensitive tools . . .*' "

Id. at 731 (internal citation and footnote omitted) (emphasis added).

In *Quantity of Books*, this Court again condemned the procedures used in the mass seizure of books slated for destruction. The Court held:

> "[I]n not first affording P-K an adversary hearing, the procedure leading to the seizure order was constitutionally deficient. What we said of the Missouri procedure also fits the Kansas procedure used to remove these books from circulation: '. . . there is no doubt that an effective restraint—indeed the most effective restraint possible—was imposed prior to hearing on the circulation of the publications in this case, because all copies on which the (sheriff) could lay (his) hands were physically removed . . . from the premises of the wholesale distributor.' "

378 U.S. at 211 (internal citations and footnote omitted). The Court rejected the argument that the procedural ills were cured

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circumstances is 'but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks' ") (quoting *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 66 (1963)).

by a post-seizure hearing on the merits of the obscenity issue. "For if seizure of books precedes an adversary determination of their obscenity, there is danger of abridgment of the right of the public in a free society to unobstructed circulation of nonobscene books." *Id.* at 213.

In *Heller* v. *New York*, 413 U.S. 483 (1973), the Court rejected the need for a pre-seizure adversarial hearing on the issue of obscenity where state officials seized a *single* copy of a film for the purposes of preserving it as evidence for trial. The Court distinguished this situation from that confronted in *Quantity of Books* and *Marcus*:

> "Those cases concerned the seizure of large quantities of books for the sole purpose of their destruction, and this Court held that, in those circumstances, a prior judicial determination of obscenity in an adversary proceeding was required to avoid 'danger of abridgment of the right of the public in a free society to unobstructed circulation of nonobscene books.' We do not disturb this holding. *Courts will scrutinize any large-scale seizure of books, films, or other materials presumptively protected under the First Amendment to be certain that the requirements of A Quantity of Books and Marcus are fully met.*"

Heller, 413 U.S. at 491 (footnotes and internal citations omitted) (emphasis added).

This Court's teachings in *Marcus*, *Quantity of Books*, and *Heller* were reviewed and reiterated in *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46 (1989). In striking down the seizure of thousands of books and films under the auspices of a state RICO statute, the Court summarized its prior holdings as follows:

> "[W]e concluded [in *Heller*] that until there was a 'judicial determination of the obscenity issue in an adversary proceeding,' exhibition of a film could not be restrained by seizing all the available copies of it. The same is obviously true for books or *any other expressive mate-*

> *rial.* While a single copy of a book or film may be seized and retained for evidentiary purposes based on a finding of probable cause, the publication may not be taken out of circulation completely until there has been a determination of obscenity after an adversary hearing."
>
> "Thus, while the general rule under the Fourth Amendment is that any and all contraband, instrumentalities, and evidence of crimes may be seized on probable cause (and even without a warrant in various circumstances), *it is otherwise when materials presumptively protected by the First Amendment are involved.*"

Id. at 63 (internal citations omitted) (emphasis added). *See also Freedman* v. *Maryland*, 380 U.S. 51 (1965) (striking down motion picture censorship statute as unconstitutional prior restraint lacking necessary procedural safeguards); *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215 (1990) (striking down content-neutral licensing system for failing to provide procedural protections).

The strict procedural requirements with regard to the seizure of potential First Amendment-protected material is rooted in the concern that this Court has consistently expressed regarding prior restraints. *Fort Wayne Books*, 489 U.S. at 63-64 (citing *Maryland* v. *Macon*, 472 U.S. 463, 470 (1985)); *Quantity of Books*, 378 U.S. at 213; *Roaden*, 413 U.S. at 504-05; *Marcus*, 367 U.S. at 736. " 'Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.' " *New York Times Co.* v. *United States*, 403 U.S. 713, 714 (1971) (quoting *Bantam Books*, 372 U.S. at 70). *See also FW/PBS*, 493 U.S. at 225; *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 419 (1971); *Carroll* v. *President and Commissioners of Princess Anne*, 393 U.S. 175, 181 (1968); *Freedman*, 380 U.S. at 57.

The instant case is squarely governed by *Fort Wayne Books*, *Quantity of Books*, and *Marcus*. There is no dispute that

Boggs' artwork is expressive material protected by the First Amendment; indeed that conclusion is law of the case.[4]

The seizures by the government of Boggs' artwork, however, failed to comply with the well-established procedural requirements mandated by the First and Fifth Amendments set forth above. As to the Pittsburg seizure, the Secret Service seized over 1,000 items from Boggs' home and studio prior to a publicized exhibition of Boggs' work in the Pittsburg area. This massive search and seizure is similar to those that were disapproved by this Court in *Fort Wayne Books*, *Quantity of Books*, and *Marcus*. As in those cases, expressive materials presumptively protected by the First Amendment were restrained from publication without *any* pre-seizure hearing to determine whether the criteria for their seizure had been met.[5] As it now stands, large quantities of artwork from a renowned artist have been seized by the government and stand on the verge of effectively being torched.

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[4] "In *Boggs* v. *Bowron*, this court held that the Boggs Bills were expressive materials, presumptively protected by the First Amendment. *Boggs* v. *Bowron*, 842 F. Supp. at 551. That holding is 'law of the case' for this analysis, and this court will proceed under the presumption that 'Mr. Boggs has a First Amendment right to create illustrations of United States currency absent constitutionally permissible overriding considerations.' *Id.*" *Boggs* v. *Merletti*, 987 F. Supp. 1, 6 n.2 (1997), reprinted in cert. petn. at 23a.

[5] The seizure here cannot be compared to the situation where only one sample was seized so as to preserve evidence for trial as in *Heller*. Indeed, Boggs was never prosecuted for violating the counterfeiting statues. In any event, the procedural requirements for even a *Heller*-type of seizure were not met. *Heller* requires a *prompt* judicial determination in an adversary proceeding after the seizure to determine if the seizure was proper. *Heller*, 413 U.S. at 493. The Court stated in no uncertain terms: "By 'prompt,' we mean the shortest period 'compatible with sound judicial resolution.' " *Id.* at n. 9 (citing *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363, 367 (1971); *Freedman*, 380 U.S. at 58-59). The government clearly failed to provide Boggs with a prompt post-seizure hearing as to whether his artwork, seized in March 1991 and December 1992, fell within the reach of the counterfeiting statutes.

The court of appeals below did not question the procedural requirements for seizures of expressive material set forth by this Court in *Marcus*, *Quantity of Books*, and *Fort Wayne Books*. Conceding that Boggs had been afforded *none* of the procedural safeguards established by these cases, the court of appeals ruled that the entire line of authority was inapplicable to Boggs because his case involved an issue of potential counterfeiting, whereas the other cases involved the issue of potential obscenity. In the court's words:

> "The cases Boggs cites are all obscenity cases, where *significant judgment* was needed to determine if the seized materials violated community standards. . . . The important First Amendment concerns advanced by the Supreme Court in the obscenity cases are not present to the same extent here. Boggs' artwork is designed to look like money. While *some judgment* is needed on the part of officers charged with enforcing the counterfeiting statutes, the inquiry is not inherently content-based and thus poses little risk of acting as a prior restraint on expressive materials."

Boggs, 161 F.3d at 41, reprinted in cert. petn. at 7a (emphasis added).

The lower court's rationale for sidestepping this Court's precedents cannot withstand scrutiny. While it is true that the rules for procedural safeguards prior to seizing expressive material were announced in the context of obscenity cases, the Court's rationale is not so narrow. Rather, both the language and the reasoning supporting the Court's decisions (*i.e.*, the suspicion with which this Court views prior restraints) broadly encompasses all situations where expressive materials protected by the First Amendment could be taken out of circulation unilaterally. *See, e.g.*, *Fort Wayne Books*, 489 U.S. at 63 ("while the general rule under the Fourth Amendment is that any and all contraband, instrumentalities, and evidence of crimes may be seized on probable cause . . . , it is otherwise when materials presumptively protected by the First

Amendment are involved"); *Marcus*, 367 U.S. at 724-29 (noting that "[t]he use by government of the power of search and seizure as an adjunct to a system for the suppression of objectionable publications is not new" and tracing the historical abuses of that power to suppress wide range of expressive activity). Clearly such situations include artwork by a renowned if somewhat controversial artist whose work has been accused of looking too much like real United States currency.

Moreover, the lower court's treatment of potential obscenity as entitled to greater protection than artwork about currency turns the First Amendment on its head. Obscene materials are, of course, entitled to no First Amendment protection and serious works of art cannot, by definition, be deemed obscene. *See Miller* v. *California*, 413 U.S. 15, 24 (1973). In fact, artistic works are fully protected by the First Amendment. *See, e.g., Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557, 569 (1995) (examples of painting, music and poetry are "unquestionably shielded"); *Ward* v. *Rock Against Racism*, 491 U.S. 781, 790 (1989) ("[m]usic, as a form of expression and communication, is protected under the First Amendment"); *Schad* v. *Mount Ephraim*, 452 U.S. 61, 65 (1981) ("[e]ntertainment, as well as political and ideological speech, is protected"); *Kaplan* v. *California*, 413 U.S. 115, 119-20 (1973) ("pictures, films, paintings, drawings, and engravings . . . have First Amendment protection").

It is a strange view of the First Amendment that would afford artistic expression involving money *less* protection than that afforded in the obscenity context. Under the lower court's rationale, had Boggs decorated his bills with arguably obscene images, he would have received the full benefit of First Amendment procedural safeguards; without a sexual theme, however, he receives none.

The court of appeals' own decision reveals the bankruptcy of its analysis. The court attempted to distinguish potential

obscenity from potential counterfeiting on the grounds that the former requires "significant judgment . . . to determine if the seized materials violated community standards," whereas the latter requires only "some judgment." This is the quintessential slippery slope that leads to a chilling of expression anathema to the First Amendment. The distinction between "significant judgment" and "some judgment" may be debated, but the fact remains that *judgment* must be exercised to determine whether any particular piece of artwork satisfies the statutory criteria for counterfeit currency.[6]

For example, the criteria for counterfeit currency cited by the court below includes whether the artwork is "in the likeness and similitude of genuine currency." *Boggs*, 161 F.3d at 42, reprinted in cert. petn at 9a. *See also* 18 U.S.C. §§ 474(a). That there is much room for judgment in determining whether this element has been met is seen by the dissenting opinion's expression of incredulity that the district court found that "a sponge and a bow tie are in the 'similitude' of actual currency . . . ." *Boggs*, 161 F.3d at 43, reprinted in cert. petn. at 13a (Rogers, J., concurring in part and dissenting in part). *See also id.* (18 U.S.C. § 474 "appears to incorporate a substantial degree of subjectivity"). Indeed, one need only look at the artistic works collected in the Appendix to wonder if they, too, would meet a secret service agent's view of the "similitude" requirement to be branded "counterfeit" under the statutes and subject to seizure and destruction as contraband.

Because a reviewer's subjective judgment must be summoned to determine whether a particular piece of artwork meets the "similitude" and "likeness" requirements for counterfeit bills, at a minimum three conclusions follow: (1) the

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[6] As noted in the dissenting opinion: "Labeling a counterfeit bill 'art' will not save it from the Secret Service's incinerator, but at some point, an artwork's loose resemblance to currency will not strip it of First Amendment protection." *Boggs*, 161 F.3d at 43 n.2 (internal citation omitted) (Rogers, J., concurring in part and dissenting in part), reprinted in cert. petn. at 12a.

situation raises all of the problems associated with any system of prior restraint, *see, e.g., New York Times Co.* v. *United States*, 403 U.S. at 714; (2) a pre-seizure adversarial hearing must be held to determine whether the counterfeiting criteria has been met in line with the *Fort Wayne Books* line of cases; and (3) any appellate review of a decision that a particular piece of artwork is "counterfeit" must be upon a full review of the record, including most importantly the work itself. *See New York Times Co.* v. *Sullivan*, 376 U.S. 254, 284-85 (1964) (an appellate court has an obligation to " 'make an independent examination of the whole record' " in cases implicating the First Amendment) (citation omitted).

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: July 1, 1999

Respectfully submitted,

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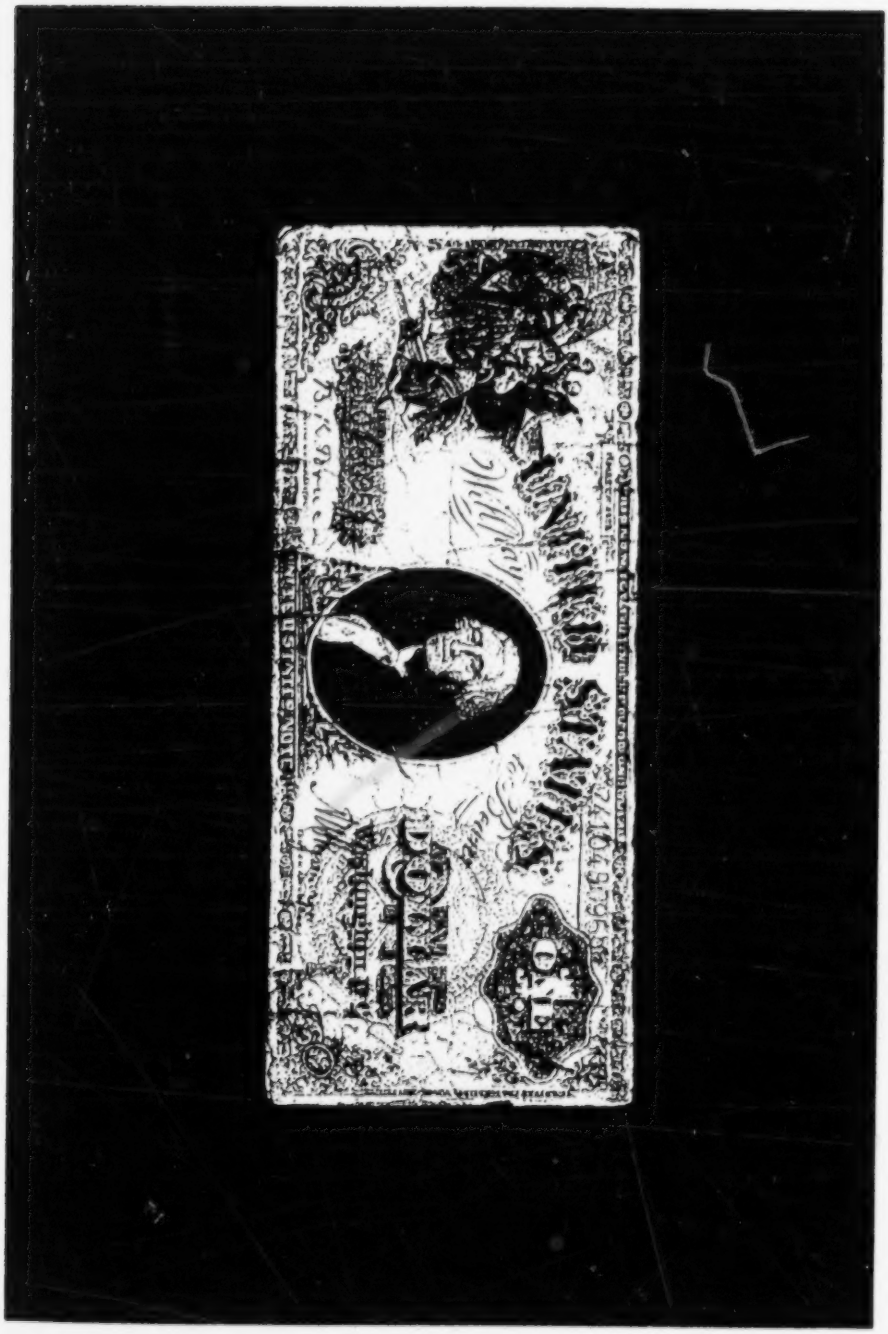

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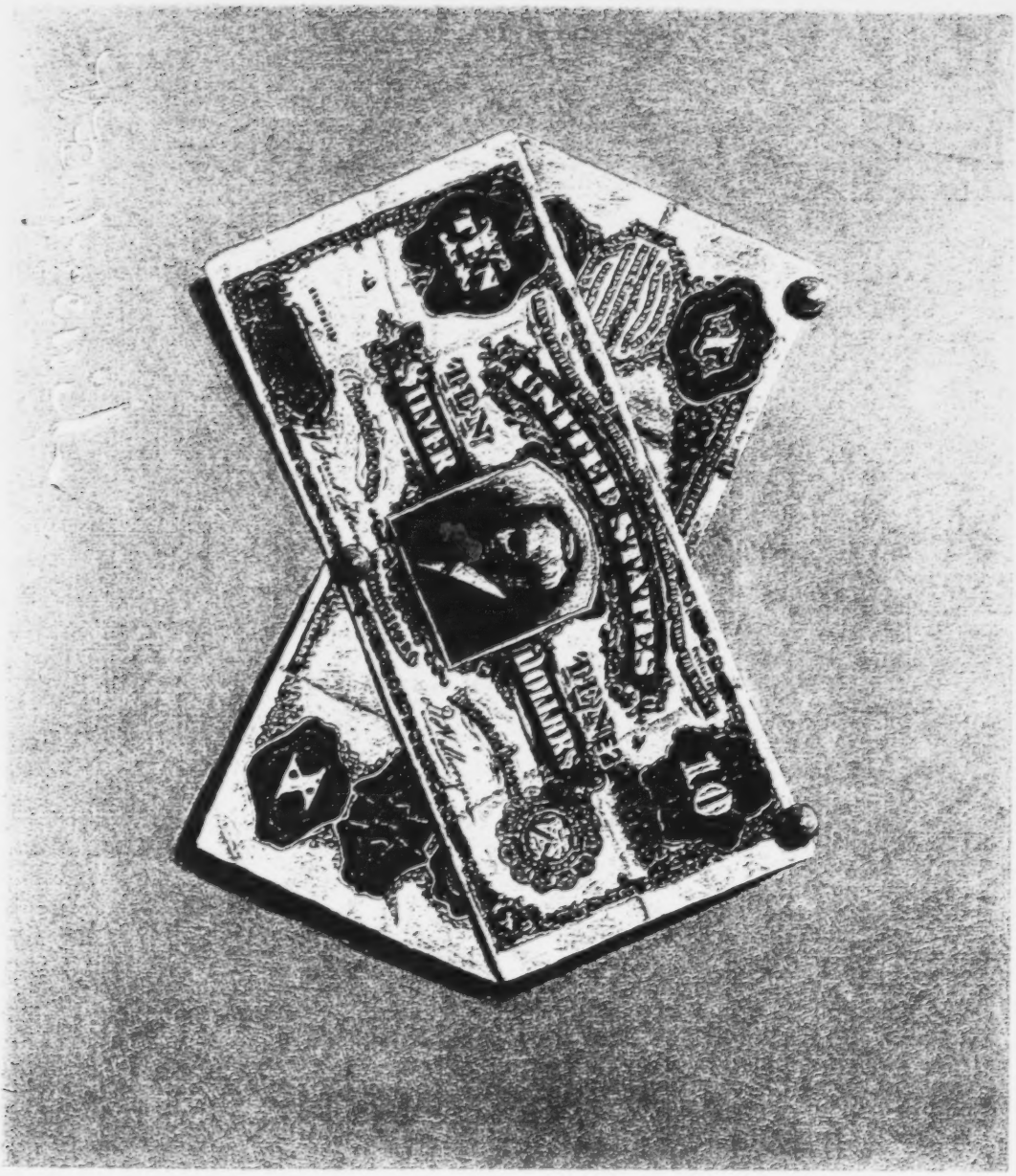
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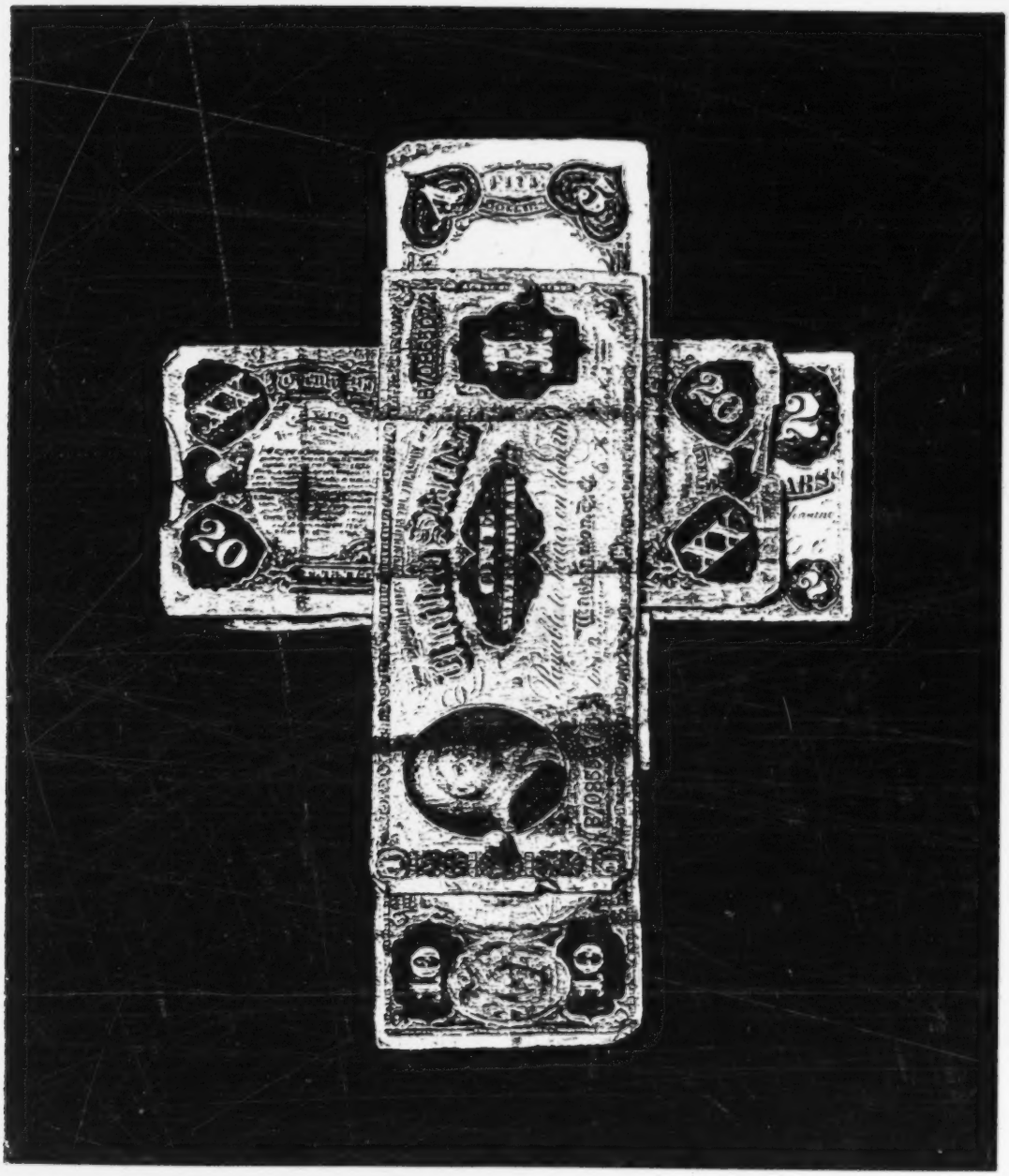

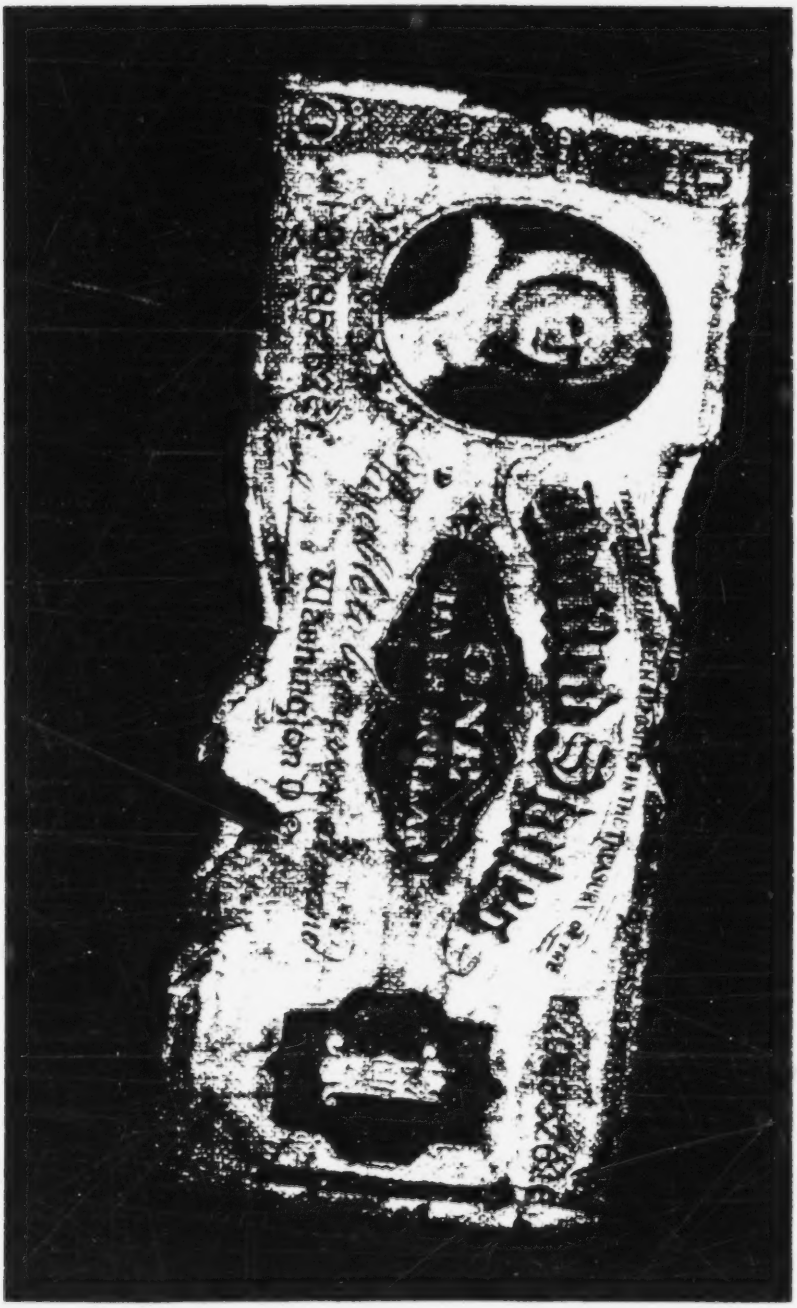

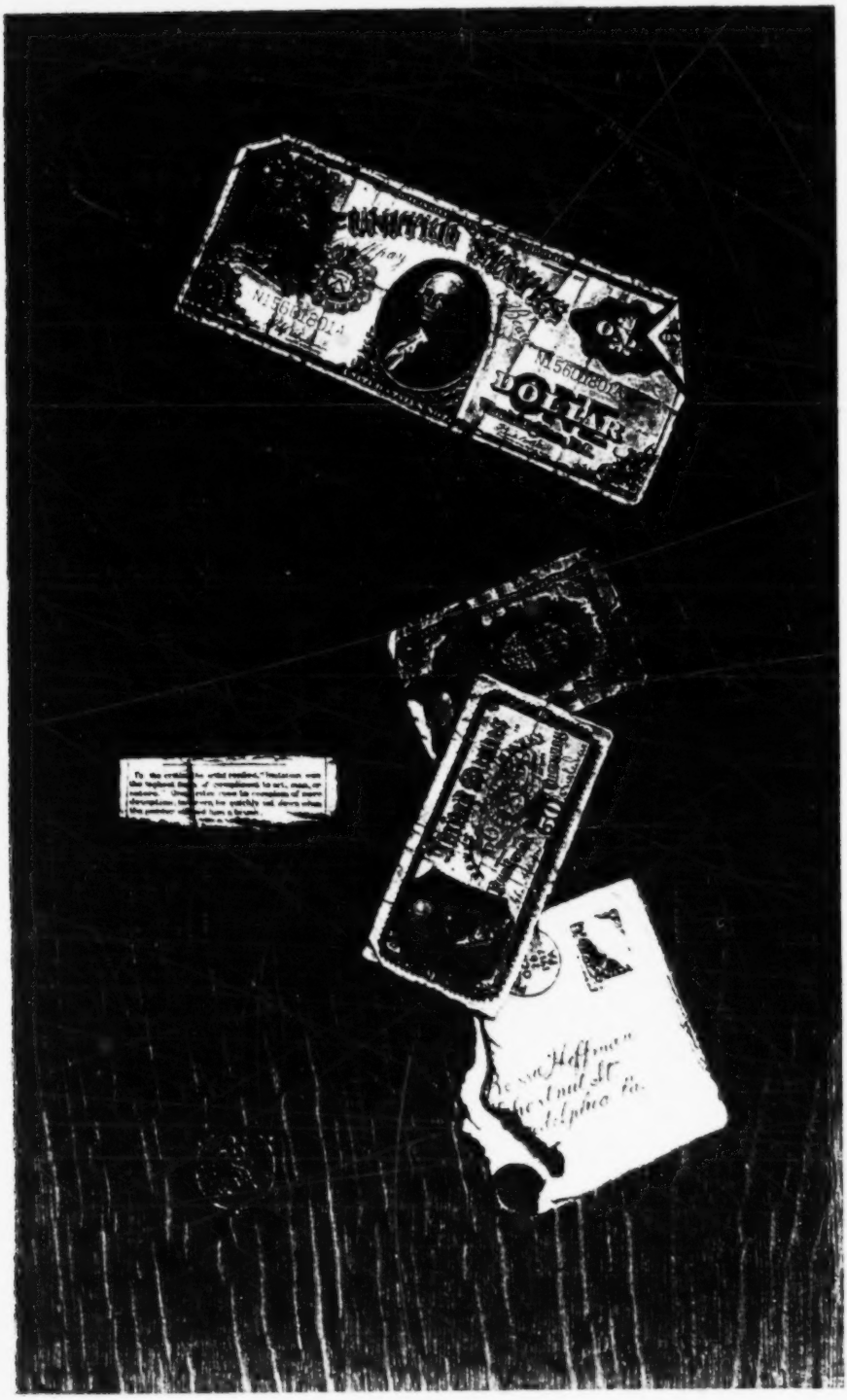
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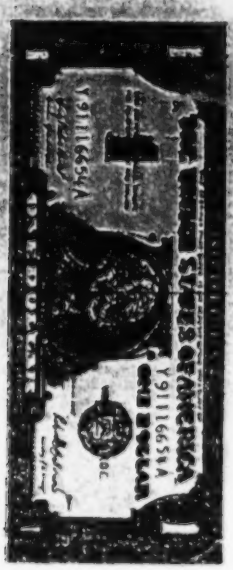
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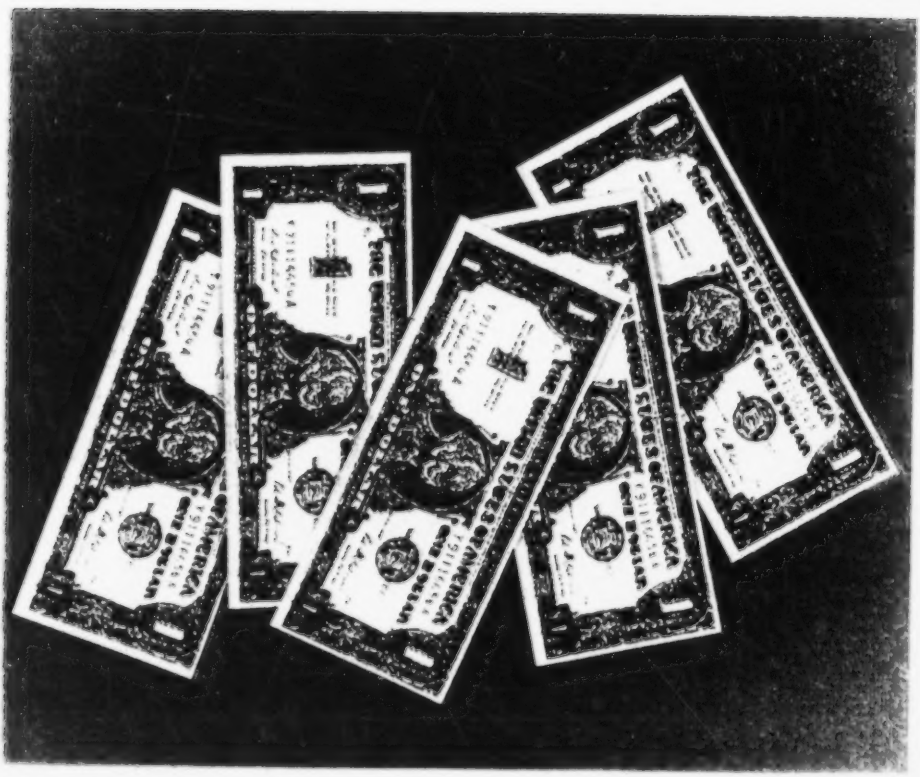

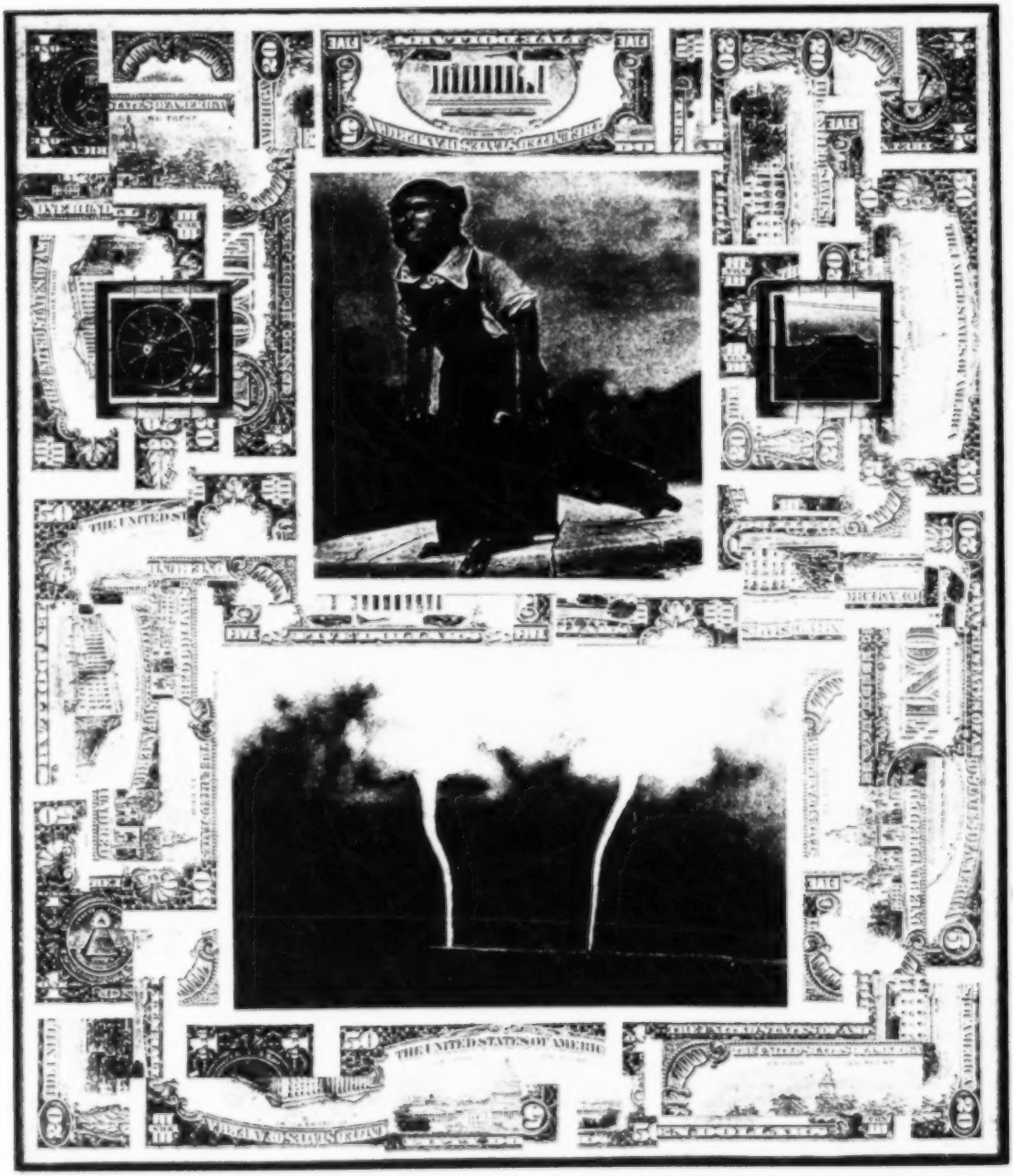

Supreme Court, U.S.
FILED
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No. 98-1785

In the Supreme Court of the United States

J.S.G. BOGGS, PETITIONER

v.

LAWRENCE H. SUMMERS, SECRETARY OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Secret Service agents may seize bills that are in the likeness and similitude of federal currency, without first providing an adversarial hearing before an independent judicial officer.

2. Whether the court of appeals correctly declined to order the record on appeal supplemented, so that it could itself view and determine if the bills at issue were in the likeness of federal currency, when petitioner failed to ask the court to supplement the record until after oral argument, and failed to raise the substantive issue in his brief on appeal.

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In the Supreme Court of the United States

No. 98-1785

J.S.G. BOGGS, PETITIONER

v.

LAWRENCE H. SUMMERS, SECRETARY OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 161 F.3d 37. The opinion of the district court (Pet. App. 16a-35a) is reported at 987 F. Supp. 1.

JURISDICTION

The judgment of the court of appeals was entered on November 6, 1998. A petition for rehearing was denied on February 3, 1999 (Pet. App. 36a). The petition for a writ of certiorari was filed on May 3, 1999. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Constitution gives Congress the power to "coin Money [and] regulate the Value thereof," Art. I,

§ 8, Cl. 5, and to "provide for the Punishment of counterfeiting the Securities and current Coin of the United States," Art. I, § 8, Cl. 6. Pursuant to that authority, Congress has prohibited the possession or production of a likeness of an obligation or security of the United States. See 18 U.S.C. 474(a) (paras. 5-6) (1994 & Supp. III 1997).[1] Congress also has provided, in 18 U.S.C. 504 (1994 & Supp. III 1997), exceptions to that prohibition. Section 504(1) permits the possession or production of illustrations of United States obligations and securities if the illustration is in black and white and less than

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[1] Paragraphs 5 and 6 of 18 U.S.C. 474(a) (1994 & Supp. III 1997) provide:

> Whoever has in his possession or custody, except under authority from the Secretary of the Treasury or other proper officer, any obligation or other security made or executed, in whole or in part, after the similitude of any obligation or other security issued under the authority of the United States, with intent to sell or otherwise use the same; or
>
> Whoever prints, photographs, or in any other manner makes or executes any engraving, photograph, print, or impression in the likeness of any such obligation or other security, or any part thereof, or sells any such engraving, photograph, print, or impression, except to the United States, or brings into the United States, any such engraving, photograph, print, or impression, except by direction of some proper officer of the United States—
>
> Is guilty of a class B felony.

Although the relevant events of this case took place between 1991 and 1993, the substance of 18 U.S.C. 474 has not changed since then. In October 1992, however, Congress renumbered Section 474 as 474(a) and added Section 474(b). See Pub. L. No. 102-550, Tit. XV, § 1552, 106 Stat. 4070. And, in September 1996, Congress changed a violation of Section 474(a) from a class C felony to a class B felony. See Pub. L. No. 104-208, Tit. VI, § 648(a), 110 Stat. 3009-367.

75% or more than 150% the size of the original, and if the negatives and plates used in making the illustrations are destroyed after their final use.[2] This Court

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[2] 18 U.S.C. 504 (1994 & Supp. III 1997) provides in pertinent part:

> Notwithstanding any other provision of this chapter, the following are permitted:
>
> (1) The printing, publishing, or importation, or the making or importation of the necessary plates for such printing or publishing, of illustrations of—
>
> (A) postage stamps of the United States,
>
> (B) revenue stamps of the United States,
>
> (C) any other obligation or other security of the United States, and
>
> (D) postage stamps, revenue stamps, notes, bonds, and any other obligation or other security of any foreign government, bank, or corporation.
>
> Illustrations permitted by the foregoing provision of this section shall be made in accordance with the following conditions—
>
> (i) all illustrations shall be in black and white, except that illustrations of postage stamps * * * may be in color;
>
> (ii) all illustrations * * * shall be of a size less than three-fourths or more than one and one-half, in linear dimension, of each part of any matter so illustrated which is covered by subparagraph (A), (B), (C), or (D) of this paragraph, except that black and white illustrations of postage and revenue stamps * * * may be in the exact linear dimension in which the stamps were issued; and
>
> (iii) the negatives and plates used in making the illustrations shall be destroyed after their final use in accordance with this section.
>
> The Secretary of the Treasury shall prescribe regulations to permit color illustrations of such currency of the United States as the Secretary determines may be appropriate for such purposes.

has held that the prohibition and the exceptions, read in tandem, do not violate the First Amendment. *Regan* v. *Time, Inc.*, 468 U.S. 641 (1984).

2. Petitioner is an artist and an academic who reproduces, in color, the currency of the United States. Petitioner admits that those reproductions, which are the same size as United States currency, can be confused with actual currency. See C.A. App. 16 (Compl. para. 6) ("Boggs draws pictures of money. They are actual-sized, *trompe l'oeil* pieces.").[3] Petitioner then uses his reproductions, referred to as "Boggs Bills," as a medium of barter. Pet. App. 17a; C.A. App. 16 (Compl. para. 6). Petitioner purchases services or goods with the notes in order to elicit "a dialogue" about "the meaning and uses of art and money." C.A. App. 111 (Boggs Aff. paras. 7-8). This case arises out of two incidents involving petitioner, the Secret Service, and petitioner's use of the so-called Boggs Bills.

The Wyoming Incident. In March 1991, the Secret Service learned from the Cheyenne, Wyoming Police Department that petitioner had attempted to obtain merchandise from a local K-Mart using one of his Boggs Bills. See C.A. App. 124-125 (Hansen Decl. para. 3). Apparently, petitioner had indicated to a sales clerk at the K-Mart that he wanted to obtain the face value of a $100 Boggs Bill in goods and receive any change in actual currency. *Ibid.*

After inspecting samples of the Boggs Bills and determining that they appeared to be the size, color and

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[3] The phrase *trompe l'oeil* means deception or trick of the eye, and refers to a style of painting that creates a strong illusion of reality, often such that the viewer, on first sight, is in doubt as to whether the thing depicted is real or a representation. See 18 *Oxford English Dictionary* 578 (2d ed. 1989).

similitude of United States currency, a Secret Service agent met with Boggs at his Cheyenne hotel. Pet. App. 17a, 19a-22a; C.A. App. 125 (Hansen Decl. para. 6). After being advised that his Bills appeared to be in violation of federal counterfeiting laws, and after what petitioner characterized as "several hours of tense negotiation," Pet. App. 21a, petitioner agreed to provide 15 samples of his reproductions (the Cheyenne Boggs Bills) to the Secret Service agent. See *id.* at 21a-23a.

The Pittsburgh Incident. In November 1992, the Secret Service learned that the petitioner had printed an additional $1 million in Boggs Bills and that he planned to spend those bills in the Pittsburgh area over the course of two years. Pet. App. 17a-18a; C.A. App. 190 (Abraham Aff. para. 17(a)). Based upon this information, the Secret Service obtained, from a magistrate judge in the United States District Court for the Western District of Pennsylvania, a warrant to search Boggs' person, studio and residence. Pet. App. 17a-18a; C.A. App. 217-224 (Warrant of Dec. 1, 1992). When the Secret Service executed that warrant, it seized a number of reproductions (the Pittsburgh Boggs Bills). Pet. App. 18a.

3. Petitioner brought this suit for declaratory and injunctive relief. He sought a declaration that the anti-counterfeiting statutes (18 U.S.C. 474, 504 (1994 & Supp. III 1997)) either did not apply to him, because he allegedly had no intent to defraud, or were unconstitutional. He sought an injunction that would, among other things, (1) prohibit the government from prosecuting him under the counterfeiting laws or otherwise interfering with his work or possessions, and (2) require the government to return all property that has been seized. He additionally sought an award of compensa-

tory damages for interference with, and injury to, his property. Pet. App. 18a; C.A. App. 14-27 (Compl.).

The district court held that the statutes at issue were constitutional on their face and as applied and did not require proof of intent to defraud. *Boggs* v. *Bowron*, 842 F. Supp. 542, 544, 562 (D.D.C. 1993). Analyzing Sections 474 and 504 in tandem, see *Regan* v. *Time, Inc.*, 468 U.S. at 647-648, the district court found the size and color restrictions of Section 504 to be reasonable time, place and manner limitations. *Ibid.*

In an unpublished judgment order, the court of appeals affirmed. See *Boggs* v. *Bowron*, No. 95-5100, 1995 WL 623690 (D.C. Cir. Oct. 12, 1995) (67 F.3d 972 (Table)). Petitioner filed a petition for a writ of certiorari, which this Court denied. 517 U.S. 1134 (1996).

4. Petitioner then moved in the district court for summary judgment on the question of whether he was entitled to the return of his property. See Pet. App. 16a ("This matter comes before the court on cross-motions for summary judgment on [petitioner's] claims for the return of his seized property."). He argued that the procedures employed by the Secret Service to obtain the Cheyenne and Pittsburgh Boggs Bills violated the First Amendment because he was not given a hearing before the seizure. And although petitioner's complaint had not raised a Fourth Amendment claim, petitioner also argued that the Secret Service's actions in obtaining the Cheyenne Bills had constituted a warrantless seizure in violation of the Fourth Amendment. He asserted that the remedy for those alleged violations is return of the bills. *Id.* at 18a-19a.

The district court rejected petitioner's claims. It first found that, on the undisputed facts of record, no seizure occurred in the Wyoming incident, since the entry into

petitioner's hotel room was consensual, as was the turning over of the Boggs Bills. Pet. App. 19a-23a. And it held that, because the officers who seized the Boggs Bills in Pittsburgh did so pursuant to a valid warrant, no Fourth Amendment violation arose out of that incident either. *Id.* at 23a-30a.

In particular, the court rejected petitioner's argument that the First Amendment required the government to provide him with a hearing before the Pittsburgh warrant was issued. Pet. App. 23a-30a. While the court recognized that, under the law of the case, the Boggs Bills were to be regarded as presumptively expressive materials, *id.* at 23a n.2, it rejected petitioner's argument that a hearing was required under cases such as *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46, 63 (1989). The court determined that those cases, which hold that special procedures are required before materials may be seized under an obscenity statute, do not apply to the seizure of counterfeit money. Pet. App. 26a. Because a warrant was obtained for the Pittsburgh seizure of Boggs Bills, and because the court held that the warrant affidavit was supported by probable cause, the court concluded that the Pittsburgh seizure did not violate petitioner's First Amendment rights. *Id.* at 28a.

The district court also held that, even if the Boggs Bills had been illegally seized, they would not be subject to return because they constituted contraband per se. Pet. App. 33a-35a. In its earlier decision, the court had examined the 15 samples relinquished in Wyoming and had found that they were similar, in size, color, and likeness, to genuine currency. It had therefore concluded that a jury would be justified "if not compelled" to find that the items were in the likeness and similitude of United States currency. *Id.* at 33a. On the

basis of that earlier determination, the court concluded that the Wyoming Boggs Bills were contraband per se. *Ibid.*

The Pittsburgh Boggs Bills had not been before the district court earlier, and petitioner had declined to make them available. Accordingly, the government submitted them to the court for its inspection. Although petitioner requested a hearing in open court to determine if the Boggs Bills were counterfeit per se, the district court denied the motion and conducted an *in camera* inspection of the Pittsburgh Boggs Bills. Pet. App. 34a-35a. Based on that inspection, the court concluded that "all of the items that the Secret Service contends are contraband are, to this court's satisfaction, reproductions of genuine currency of the United States or reproductions of genuine foreign currency. Each are in the likeness and similitude of genuine currency and therefore in violation of 18 U.S.C. §§ 472 or 481." Pet. App. 35a.[4]

5. The court of appeals affirmed. Pet. App. 1a-15a. First, the court rejected petitioner's argument that the Secret Service should have afforded petitioner an adversarial hearing, before an independent judicial officer, prior to seizing the "Boggs Bills." "Bogg's artwork is designed to look like money," the court explained, and was therefore subject to seizure as a violation of the counterfeiting statutes. *Id.* at 7a. The court of appeals also distinguished the pornography

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[4] While the court concluded that all the Boggs Bills that the Secret Service claimed to be contraband were in fact contraband per se, and therefore subject to forfeiture, it found that the Secret Service had correctly declined to forfeit many of the Boggs Bills because they were not contraband and therefore were not forfeited. Indeed, of 81 reproductions in one group, only three were found to be contraband. See Pet. App. 35a.

cases on which petitioner relied, pointing out that the counterfeiting statute leaves officers in the field substantially less discretion, and has a significantly lower potential impact on protected expression, than the pornography statutes at issue in those cases. "While some judgment is needed on the part of the officers charged with enforcing the counterfeiting statutes, the inquiry is not inherently content-based and thus poses little risk of acting as a prior restraint on expressive materials," the court of appeals explained. *Ibid.*

The court of appeals also held that the district court acted properly when it inspected the Boggs Bills *in camera*. Petitioner, the court of appeals concluded, had no right, on summary judgment, to have the bills examined in open court. And while petitioner asserted that he could not tell from the record what items were submitted to the court for inspection, the court of appeals observed that "he received notice from the government listing the items submitted." Pet. App. 8a.

Finally, the court of appeals upheld the statutory standard for counterfeit currency used by the district court and embodied in 18 U.S.C. 474, but declined to examine the Boggs Bills to determine whether the lower court had correctly applied that standard. Petitioner, the court of appeals pointed out, had failed to raise that issue—*i.e.*, whether or not his Bills were in fact contraband per se—until after oral argument. Citing Federal Rule of Appellate Procedure 28(a)(4), the court held that it was "too late in the appellate process" to ask for such review. Pet. App. 10a.

Judge Rogers concurred in part and dissented in part. While she acknowledged that petitioner's appeal "focused on his First Amendment procedural claim without explicitly contending that his art does not meet the statutory definition of counterfeit currency," Pet.

App. 11a, she nonetheless concluded that the court of appeals should overlook any waiver, *id.* at 12a, and review the Bills. In her view, the preferable course would have been to supplement the record with the Boggs Bills so as to permit the court to determine whether or not the lower court had properly evaluated them. *Id.* at 11a-12a.

ARGUMENT

The decisions of the courts below are correct and do not conflict with the decisions of this Court or any other court of appeals. Accordingly, further review is not warranted.

1. Petitioner first argues that the government's seizure of his "Boggs Bills" constituted an unlawful prior restraint. According to petitioner, he should have been afforded a hearing before his *trompe l'oeil* currency was seized. He seeks return of the seized reproductions of currency as a remedy for that alleged violation. See Pet. 13-20.

a. As an initial matter, it is far from clear that petitioner's prior restraint claim—*i.e.*, his challenge to the government's failure to afford him an adversary hearing before seizing his Boggs Bills—is properly before the Court in this case.[5] Petitioner's motion in

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[5] Moreover, there is some question concerning the district court's authority to order the return of the property. Although the district court purported to "operate under its equitable power in determining whether the property should be returned," Pet. App. 30a-31a n.3, in our view such a power, if it exists at all, cannot be used to compel officers of the United States to turn over property held by the United States absent a waiver of sovereign immunity. Petitioner nowhere identifies the waiver of immunity that would permit a suit to compel the return of property here. But see *Polanco* v. *DEA*, 158 F.3d 647, 652 (2d Cir. 1998) (concluding that

district court sought one form of relief alone: return of the seized bills. Pet. App. 16a ("This matter comes before the court on cross-motions for summary judgment on [petitioner's] claims for the return of his seized property."); *id.* at 30a (petitioner's "rationale for challenging the above seizures is that he seeks return of the items"); *id.* at 4a-5a ("Boggs argued that * * * the appropriate remedy [for the allegedly unlawful seizures] was return of the seized goods."); see also *id.* at 2a ("Boggs argues that these errors require us to order the government to return his artwork.").[6] It is now clear, however, that the bills cannot be returned *even if* their initial seizure was improper because they are contraband per se, and thus illegal to possess. See *id.* at 32a-33a. In particular, the district court expressly concluded that "a jury would be compelled to find that the fifteen Cheyenne Boggs Bills" seized in Wyoming "violate 18 U.S.C. § 474, para. 5," because they are in the "general pattern of general currency" and "in the likeness and similitude of genuine United States currency." Pet. App. 33a (citation omitted). Likewise, it expressly concluded that "[e]ach reproduction" seized in Pennsylvania "has the general design and appearance of genuine * * * currency." *Id.* at 35a.

The conclusion that the Bills are contraband per se—and thus illegal to possess—precludes petitioner

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waiver of immunity in Administrative Procedure Act, 5 U.S.C. 702, extends to suits for the return of property).

[6] Nor can petitioner persuasively argue that this issue is "live" because, if he prevailed, he might be entitled to the monetary relief requested in his complaint. Petitioner abandoned that claim in this action—choosing instead to raise it through a separate action, No. 95-1051 (D.D.C)—and in any event sought no relief other than return of his Bills either in his motion for summary judgment in district court or on appeal in the D.C. Circuit.

from recovering the Bills even if one were to assume that the initial seizure of those Bills constituted an unlawful prior restraint. As this Court has explained, where the subject "property [i]s contraband," the individuals from whom it was seized "have no right to have it returned to them." *Trupiano* v. *United States*, 334 U.S. 699, 710 (1948); *United States* v. *Jeffers*, 342 U.S. 48, 53 (1951) (same). For example, where the police discover heroin during an unlawful search, the victim of that search may be able to seek suppression of the heroin in the subsequent criminal trial; the victim may even be able to seek an award of damages. But he cannot seek the return of contraband narcotics he cannot lawfully possess. The same reasoning applies to the contraband counterfeit Boggs Bills that petitioner seeks to have returned here. As the district court explained, "[i]f mere possession of an item is a crime, the government's return of that item would make the recipient a criminal, and a court cannot enter an order that would lead to such a result." Pet. App. 33a.

That conclusion flows not only from the contraband nature of the Boggs Bills and this Court's decisions in *Trupiano* and *Jeffers*, but also from this Court's reasoning in *Carey* v. *Piphus*, 435 U.S. 247 (1978). There, the plaintiffs claimed to have been suspended in violation of procedural due process. Agreeing with the analysis of the court of appeals below, this Court held that the plaintiffs were not entitled to recover compensation for injuries caused by the suspensions *if* they "would have been suspended even if a proper hearing had been held." *Id.* at 260. If the suspensions would have occurred in any event, the Court explained, the lack of a prior hearing "could not properly be viewed as the cause of the suspensions." *Ibid.*

That same reasoning precludes petitioner from recovering the Bills as a remedy for their having been seized without prior process in this case. In the years following the seizures at issue here, this case has been thoroughly litigated in district court, and twice appealed in the court of appeals; that process has shown that the Bills are contraband per se. Consequently, it is clear that, even if petitioner had been granted a prior, adversary hearing before the Bills were seized, that hearing would not have prevented the seizure from taking place. To the contrary, just as the later hearing found the Bills to be contraband per se and subject to seizure and forfeiture, so too would have a hearing before seizure. Because the Bills would have been seized "even if a proper [pre-seizure] hearing had been held," the allegedly unlawful failure to hold such a hearing cannot "properly be viewed as the cause" of the seizures and cannot entitle petitioner to return of the Bills. *Carey*, 435 U.S. at 260.[7]

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[7] To the extent petitioner seeks to challenge the conclusion that the Bills are contraband per se, petitioner waived that fact-bound claim by failing to raise it in a timely fashion below. See pp. 19-20, *supra*; see also Pet. App. 10a. In any event, the record establishes that the works in dispute are contraband per se. The Secret Service submitted affidavits of counterfeiting experts attesting to the fact that Boggs Bills meet the definition of counterfeit currency—and hence constitute contraband per se. The district court, which reviewed the Bills, reached the same conclusion. And petitioner's own complaint appears to concede the point, referring to the Boggs Bills as "actual-sized, *trompe l'oeil* pieces," C.A. App. 16 (Compl. para. 6), *i.e.*, as actual-sized reproductions of currency drawn in a style that is sufficiently life-like to "fool the eye." See note 3, *supra*. See also C.A. App. 111 (Boggs Aff. para. 9) ("My work simply would not carry the same meaning in black and white or in grotesquely enlarged or comically shrunken size.").

Consequently, petitioner's prior restraint claim is largely irrelevant to the propriety of the district court's decision denying petitioner's motion for return of the Bills. Because petitioner's Boggs Bills are contraband, petitioner is not entitled to their return, the only relief petitioner sought in the motion before the district court, even if a prior restraint had been unlawfully imposed. Conversely, if the courts' conclusion regarding the contraband status of the Boggs Bills were incorrect, the illegality of the initial seizure would neither enhance nor lessen the force of petitioner's claim for their return. If the Bills were not subject to forfeiture as contraband, petitioner's right to their return would not be defeated by a finding that the initial seizure was lawful and based on probable cause to believe the Bills were subject to forfeiture.

The prior restraint issue thus has no bearing on the correctness of the district court's and court of appeals' decisions not to order the return of petitioner's property, and is not properly before the Court. And that remains true even though the lower court decisions purported to address that issue. This Court "reviews judgments, not statements in opinions," *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956), and does not "decide questions that cannot affect the rights of litigants in the case before them." *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477 (1990) (internal quotations omitted).

b. In any event, the district court and court of appeals both properly rejected petitioner's prior restraint argument. According to petitioner, the Secret Service was required to conduct an adversarial proceeding to determine the propriety of seizing the Cheyenne and Pittsburgh Boggs Bills before the seizure occurred. In obscenity cases involving books,

films, and videotapes, petitioner points out, the strong First Amendment-based policy against prior restraints on free speech requires such a "prompt judicial determination [of the obscenity issue] in an adversary hearing" before all available copies of a book or movie may be seized. *Heller* v. *New York*, 413 U.S. 483, 492 (1973); *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46, 63 (1989).

As for the Wyoming Bills, the argument fails because the district court found that they were not seized but instead were voluntarily surrendered, Pet. App. 19a-23a, and petitioner never disputes that finding. More fundamentally, petitioner's attempt to extend the prior restraint doctrine to the counterfeiting context is erroneous. In the context of obscenity seizures, a pre-seizure hearing is required in part because a "dim and uncertain line" separates obscenity from protected expression. *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 66 (1963); see *A Quantity of Books* v. *Kansas*, 378 U.S. 205, 210 (1964) (plurality opinion). As the district court below pointed out (Pet. App. 25a-26a), reasonable minds can and often do differ over what is, and what is not, obscene. Indeed, this Court's formula for separating obscenity from protected expression—"whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest"—is quite subjective and requires a great degree of judgment in its application. See *Roth* v. *United States*, 354 U.S. 476, 489, 491 (1957). Consequently, "[f]or a magistrate or other judicial officer to make a probable cause determination based merely on the bald affidavit of a police officer presents too much of a possibility that the subjective impression of that police officer will act as a prior restraint on protected speech." Pet. App. 25a.

In contrast, the standards to be applied in the counterfeiting context—whether or not the materials are in the likeness of United States currency, and whether or not they are within the permissible size and color specifications set forth in 18 U.S.C. 504—are relatively clear and easy to apply. Pet. App. 26a. No "subjective" determinations are required; the only question is whether the material to be seized looks like money. *Ibid.* Moreover, unlike the seizure of allegedly obscene materials, the seizure of alleged counterfeit money does not by its very nature raise a grave risk that protected materials will be seized. As a result, the sound constitutional reasons for requiring a prior hearing before permitting the seizure of materials alleged to be obscene simply do not apply to the seizure of materials alleged to be counterfeit.

Petitioner is mistaken to claim that the decisions of the district court and the court of appeals afford sexually explicit materials greater protection than other forms of expression, Pet. 18, or that they limit the prior restraint doctrine to cases that "involve sex," Pet. 19. Neither court below held that the prior restraint doctrine applies only to allegedly obscene (or sexually explicit) materials. Instead, they merely declined to extend that doctrine to a context—the enforcement of the Nation's counterfeit laws—in which the applicable standards are neither inherently subjective nor content-based, and where there is no grave risk that seizures without prior adversary hearings will suppress protected expressive materials.

2. Petitioner also argues that the district court erred in viewing the Pittsburgh Boggs Bills *in camera* and failing to grant him an in-person hearing at which he could present evidence and argument. See Pet. 20-24.

Those case-specific claims do not warrant this Court's review.

a. Although due process generally requires notice and an opportunity to be heard, see Pet. 21, it does not always require an in-person hearing at which witnesses and evidence may be presented. To the contrary, motions to dismiss under Federal Rule of Civil Procedure 10(b) and motions for summary judgment under Federal Rule of Civil Procedure 56 are regularly granted on the basis of paper submissions alone, as they were here. Moreover, petitioner had, during the years of litigation created by this case, ample opportunity to show that the Pittsburgh Boggs Bills do not fall within the prohibition of the counterfeit laws. And he specifically attempted to do so through the affidavits he submitted in support of his motion for summary judgment. See C.A. App. 107 (Boggs Aff.); C.A. App. 155 (Bittman Decl.). The affidavits and arguments he submitted, however, simply did not reveal a need for the district court to hear further oral argument or take additional testimony from witnesses. Under those circumstances, it was not an abuse of discretion for the district court to rely on the evidence submitted and resolve the summary judgment motions without a further hearing. Pet. App. 7a; see also *id.* at 15a n.7 (Rogers, J., concurring in part and dissenting in part) ("I * * * concur in the court's holding that *in camera* review was * * * appropriate.").[8]

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[8] Petitioner's suggestion that he was entitled to a jury trial before civil forfeiture could be ordered, Pet. 23, is also incorrect. Since no reasonable juror could have concluded that petitioner's documents were *not* contraband, see p. 11, *supra*, the district court properly granted the government's motion for summary judgment.

Nor is petitioner correct to suggest (Pet. 21) that the decision is inconsistent with *Robinson* v. *Hanrahan*, 409 U.S. 38, 39-40 (1972) (per curiam), and *United States* v. *James Daniel Good Real Property*, 510 U.S. 43 (1993). Although petitioner characterizes *Robinson* as having reversed a forfeiture order "on the ground that the owner did not receive actual notice of the forfeiture hearing," Pet. 21, in fact the constitutional defect in that case was the State's failure to make sufficient efforts to advise the owner that *forfeiture proceedings* had been *instituted* against his property—a defect that deprived him of any opportunity (on paper or in person) to contest the forfeiture action. See 409 U.S. at 39-40 (holding that the *in rem* forfeiture violated due process because the notice provided by the State was not "'reasonably' calculated to apprise [the owner] of the pendency of the forfeiture proceedings"). Petitioner's reliance (Pet. 21-22) on this Court's decision in *James Daniel Good Real Property*, *supra*, is misplaced for similar reasons. That case merely held that, absent exigent circumstances, *real property*—a home—cannot be seized by the government without affording the owner notice and an opportunity to be heard. See 510 U.S. at 46, 52-54. This case did not concern real property and petitioner, in any event, was clearly given the opportunity to address—in his moving papers and in response to the government's moving papers—whether or not his Bills were contraband per se and thus subject to forfeiture. See Gov't Mem. of Points and Authorities 5-7 (Jan. 30, 1997) (arguing that the Bills are contraband per se and thus not subject to return).

b. Petitioner, in any event, forfeited his claim that the district court should not have reviewed the Bills *in camera* because he failed to object to that procedure in

the district court. Pet. App. 8a. Although petitioner attempts to blame others for that omission, see Pet. 23, his argument is unpersuasive and unrelated to any generalized issue of national importance. Petitioner never objected to the district court's review of the bills *in camera* in district court, either before the district court reviewed the bills and entered judgment, or, through a motion for reconsideration, after the district court did so. Cf. *Insurance Servs.* v. *Aetna Cas. & Sur. Co.*, 966 F.2d 847, 852 (4th Cir. 1992) (where party "had no opportunity to object" until after the district court issued its order, an objection in a "motion for reconsideration" is considered "timely made"). Nor did petitioner seek access to the bills during the district court proceedings. Under those circumstances, the court of appeals did not err in concluding that petitioner's claim of error was forfeited. See Pet. App. 8a ("If there was error, * * * [petitioner] could have avoided any ill effect by proper motion below."); *id.* at 15a n.7 (Rogers, J., concurring in part and dissenting in part) ("With respect to [petitioner's] claim that the district court erred by viewing the bills *ex parte*, I concur in the opinion of the court * * * to the extent that it relies on [petitioner's] failure to seek access to the bills during the district court proceedings. * * * [T]he district court's procedure [did] not result in reversible error.").

3. Finally, petitioner complains that the court of appeals failed to rule on whether the Boggs Bills in fact violate 18 U.S.C. 474(a) (paras. 5-6), and affirmed the district court's judgment without having actually seen the Boggs Bills. Pet. 24-25. That claim is both fact-bound and without merit.

As the court of appeals made clear, it had good reason for declining to review the district court's application of 18 U.S.C. 474 and 504 to the Boggs Bills

by reviewing the Bills—petitioner did not timely ask it to do so. Although Rule 28(a) of the Federal Rules of Appellate procedure requires the argument section of an appellant's brief to contain "the contentions of the appellant with respect to the issues presented," petitioner failed to ask the court of appeals "to make a full reexamination of the merits of the grant of summary judgment" by reviewing the Bills and applying the appropriate standard to them. Pet. App. 10a; see also *id.* at 11a (Rogers, J., concurring in part and dissenting in part) (Petitioner "should not be too surprised by this result, as his appeal" did not "explicitly contend[] that his art does not meet the statutory definition of counterfeit currency.").

Indeed, petitioner actually sought to deprive the court of appeals of access to the Boggs Bills so as to prevent it from conducting that review. Although petitioner now complains that the record did not include the actual Boggs Bills at issue, Pet. 24, petitioner not only failed to file a timely motion to supplement the record to include those Bills, Pet. App. 10a, but actually opposed, in his court of appeals brief, the government's offer to present the Boggs Bills to the court for inspection, *ibid.* Only during oral argument did petitioner change his mind about the government's offer, and only afterward did he move to supplement the record. *Ibid.* As the court of appeals explained, that is "simply too late in the appellate process" to ask the court of appeals to address an additional issue and to ask it to supplement the record so as to be able to do so. *Ibid.* At the least, that ruling did not constitute an abuse of the court of appeals' discretion. Petitioner's fact-bound challenge to it does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 98-1785

IN THE
Supreme Court of the United States

J.S.G. BOGGS,
Petitioner,

v.

LAWRENCE H. SUMMERS, BRIAN L. STAFFORD, and JANET RENO,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

1. Prior Restraint.—The Petition demonstrates that the self-help confiscation of Boggs' art without *any* procedural safeguards was a gross departure from established First Amendment requirements. The Petition also demonstrates that the lower courts approved this departure on the ground that erotic expressive material charged with obscenity is entitled to more First Amendment protection than other speech.

Respondents do not and cannot deny that Boggs' art is entitled to protection under the First Amendment. They do not and cannot deny that they did not provide anything resembling the process this Court mandated in *Freedman v. Maryland*, 380 U.S. 51 (1965), and its progeny. And they do not and cannot deny that the

Freedman safeguards apply to a wide variety of speech—not just erotic expression.

Respondents also ignore the views of *amici*—who confirm that Boggs is a well-regarded artist whose work merits serious consideration, drawing attention to issues concerning the interplay between art and money and the many ways in which they coexist.[1]

a. Respondents' "Remedy" Argument.—Respondents' principal argument in opposition to the Petition is not to deny the importance of the issue or even to defend the lower courts on the merits but to make an oblique suggestion that this Court may not be in a position to effect the relief Petitioner seeks: the return of his art as a remedy for the First Amendment violations he has suffered. Respondents' argue that the First Amendment violation must go without a remedy because "contraband *per se*" may never be returned. Opp. 10-14.[2]

In the first place, Respondents' position begs the question because it assumes that Boggs' art was "contraband *per se*," although that was an issue on which the government had the burden of proof. An item is not "contraband *per se*" until the government proves that the item

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1 Respondents' case seems to turn in large part on a wooden translation from the French of the phrase "*trompe l'oeil.*" The fact of the matter is that *trompe l'oeil* works of art do not fool the *brain*, they fool the *eye*—for an instant; they tease the viewer, as does Boggs' art. If they did actually deceive, they would not be works of art. Because Respondents insist on distorting the nature of Boggs' work—which is not in the record because of the extraordinary departures in the courts below from normal judicial procedures—Petitioner respectfully invites the Court to evaluate the two representative samples of Boggs' work attached hereto (App. 1a to 4a).

2 Respondents also claim that even if the art was not contraband and was improperly seized, they could not be made by the courts to give it back (Opp. 10-11 n.5), a position for which they cite no authority. *See infra* pp. 3-5 & n.4, p. 10.

fits a valid statutory prohibition.[3] In this case, the only "proof" has come in an *ex parte* hearing of which no transcript was taken and in which neither the alleged "contraband" nor copies of it nor any description of it ever made it into the record.

Even on its own terms (that is, assuming that Boggs' art or portions of it were contraband) Respondents' suggestion is wrong for two reasons. *First*, this and other courts have held repeatedly that the remedy for the improper seizure and retention of property presumptively protected by the First Amendment, invalid for absence of an adversary hearing, is the return of the material. Even the District Court, which ruled against Boggs, recognized that "Boggs accurately notes that the proper remedy for the unconstitutional seizure and retention of [expressive] property is the return of the material." Pet. App. 30a. The District Court's statement was indisputably correct.

In *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 206-08 (1964), the books at issue had been seized without a prior adversary hearing. Less than two months after the seizure, a state trial court held a hearing and adjudged the books to be obscene. *See State v. A Quantity of Copies of Books*, 379 P.2d 254, 255 (Kan. 1963), *rev'd* 378 U.S. 205 (1964). That determination, as well as the order to destroy the books, was affirmed by the state appellate courts. *Id.* at 257. This Court accepted the state courts' post-seizure determination that the books at issue were obscene—and thus contraband *per se*—but

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[3] *See, e.g., United States v. 37.29 Pounds of Semi-Precious Stones*, 7 F.3d 480, 485 (6th Cir. 1993) ("[u]ntil the United States proves [the elements of the statute rendering the stones contraband including] illegal importation, the gemstones are not the property of the United States"); *Cooper v. City of Greenwood*, 904 F.2d 302, 305-06 (5th Cir. 1990).

held that the post-seizure hearing did not cure the First Amendment violations that had occurred, and reversed the order authorizing their destruction. 378 U.S. at 208, 212-13.

Indeed, this Court has expressly and repeatedly rejected the claim that the status of particular expressive materials as "contraband" constitutes a defense for failure to follow constitutionally required procedure in their seizure. *See A Quantity of Copies of Books*, 378 U.S. at 211-12 ("it is no answer to say that obscene books are contraband"); *Marcus v. Search Warrant*, 367 U.S. 717, 730-31 (1961) ("assimilation of obscene literature to gambling paraphernalia and other contraband . . . does not answer the appellants' constitutional claim, but merely restates the issue whether obscenity may be treated the same way"); *Cinema Classics, Ltd. v. Busch*, 414 U.S. 946 (1973), *aff'g* 339 F. Supp. 43, 48-49 (C.D. Cal. 1972) ("Defendants assert that they have the right to retain all of the materials seized regardless of the legality of the warrants or the legality or illegality of the manner in which they were executed. They assert this right of retention on the theory that the materials seized are 'contraband.' This argument must be rejected."); *see also Fort Wayne Books v. Indiana*, 489 U.S. 46, 66-67 (1989) (emphasizing that the government cannot escape these constitutional safeguards through its characterization of the seized materials). The presumption of First Amendment protection for expressive materials cannot be rebutted *until* the "claimed justification for [seizure] . . . is properly established in an adversary proceeding." *Id.* at 67.

Respondents fail to discuss or distinguish these holdings. They also fail to acknowledge the multitude of cases ordering return of expressive material—material that the government generally contended to be "contra-

band *per se*"—as a remedy for First Amendment violations.[4]

Second, Respondents' approach would turn on its head the standard laid down by this Court in *Freedman v. Maryland*, and followed repeatedly in case after case. In *Freedman*, the Court ruled not only that any seizure of expressive materials must be for a brief and specified period, but also that the government must bear the burden of going to court to suppress the speech and bear the burden of proof once in court. 380 U.S. at 58-59. Respondents do not even cite *Freedman*. Instead, they suggest a radical new approach derived from *Carey v. Piphus*, 435 U.S. 247 (1978), a case interpreting the Fourteenth Amendment. Under Respondents' approach, the government would be free to seize expressive material and then do nothing. The *speaker* would then have the burden of going to court and, once in court, proving that the expressive material is *not* "contraband." Merely stating Respondents' position demonstrates what a radical

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[4] *E.g.*, *United States v. Pryba*, 502 F.2d 391, 404 n.97 (D.C. Cir. 1974) (ordering return of First Amendment materials seized without prior adversary hearing); *American News Co. v. Ladas*, 454 F.2d 1237, 1240 (6th Cir. 1972) (same); *Huffman v. United States*, 470 F.2d 386, 392 (D.C. Cir. 1971) (same), *conviction vacated on further appeal*, 502 F.2d 419 (D.C. Cir. 1974); *Astro Cinema Corp. v. Mackell*, 422 F.2d 293, 298 (2nd Cir. 1970) (same); *United States v. Alexander*, 428 F.2d 1169, 1176 (8th Cir. 1970) (same); *Bethview Amusement Corp. v. Cahn*, 416 F.2d 410, 411-12 (2d Cir. 1969) (same); *Tyrone, Inc. v. Wilkinson*, 410 F.2d 639, 640-41 (4th Cir. 1969) (same); *Metzger v. Pearcy*, 393 F.2d 202, 203-04 (7th Cir. 1968) (same); *Lee v. City of Rome*, 866 F. Supp. 545, 552 (N.D. Ga. 1994) (same); *Sooner State News Agency, Inc. v. Fallis*, 367 F. Supp. 523, 528-29 (N.D. Okla. 1973) (same); *Platt Amusement Arcade, Inc. v. Joyce*, 316 F. Supp. 298, 299-300 (W.D. Pa. 1970) (same); *City of Duluth v. Wendling*, 237 N.W.2d 79, 82-83 (Minn. 1975) (same); *People v. Superior Court*, 104 Cal. Rptr. 876, 890-91 (Cal. Ct. App. 1972) (same); *Johnson v. City of Rochester*, 197 N.W.2d 244, 247 (Minn. 1972) (same).

departure it would be from this Court's First Amendment jurisprudence. The other cases cited by Respondents (Opp. 12) involve the return of non-expressive contraband, and say nothing about the appropriate remedy for a violation of the First Amendment.

b. Respondents' Failure to Address Freedman.—When Respondents finally get to the merits, they have almost nothing to say. They ignore the First Amendment cases holding the *Freedman* safeguards applicable to all kinds of speech, including political speech, charitable fundraising, news reporting, popular entertainment, and even commercial speech. *See* Pet. 15-16 & nn.8-10, 19 & n.12. In fact, Respondents do not even cite *Freedman* itself. They merely claim that the lower courts were correct in "declining" to "extend" (Opp. 16) the *Freedman* safeguards beyond the context of "obscenity," because obscenity seizures require the exercise of "quite subjective" judgment. Opp. 15. But the standard for obscenity prosecutions ("whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest" (Opp. 15)) does not appear any more "subjective" than the standard for counterfeiting prosecutions (whether the items "bear such a likeness or a resemblance to a genuine [bill] . . . as is calculated to deceive an honest, sensible and unsuspecting person of ordinary observation and care supposed to be honest and upright" (Pet. 17 & n.11)). Both standards require interpretation of what the "average" or "reasonable" person would think about the intent or purpose of a picture: the obscenity standard requires judgment about whether the average person would think the picture "appeals to the prurient interest" and the counterfeiting standard requires judgment about whether a reasonable person would think

the picture is "calculated to deceive." (On that question, see the exemplars appended to this Reply Brief.)

Moreover, *Freedman* and its progeny turned on the *opportunity* for unsupervised censorship, not on the *quantum* of judgment the censor must exercise. Even the panel majority conceded that the counterfeiting standard requires the exercise of "some j dgment" (Pet. App. 7a) and Judge Rogers, in dissent, pointed out that it was the questionable "judgment" of the Secret Service and the District Court that a sponge and a bow tie could be "calculated to deceive" as is required by the statute at issue here (Pet. App. 13a).

2. Ex Parte Submission.—Respondents never come to grips with the *ex parte* nature of the proceedings in the District Court. In fact, the words "*ex parte*" do not appear in Respondents' Opposition. Instead of defending the *ex parte* receipt of the core evidence in the case, Respondents pretend that the defects complained of in the Petition were merely that there was argument on paper rather than orally in open court, and that the procedure took place in chambers rather than in open court. But the process afforded did have some other difficulties, which Respondents do not mention, namely that: Boggs did not know which objects the government had submitted to the Judge for his consideration; Boggs did not have copies of the objects or even a list describing them; the Judge did not identify the particular objects that he found to be contraband; Boggs had no opportunity for particularized argument concerning the particular objects; and neither the objects nor any copy or description of them ever made it into the record. Respondents offer no justification for this radical departure from the ordinary judicial process other than to distort the record, misleadingly stating that Boggs "declined" to make the evidence available to the District Court (Opp. 8); the record shows that the evi-

dence has been under lock and key in the vault of the Secret Service since 1992 (Pet. App. 18a). Respondents fall back on the absurd contention that the burden was on the plaintiff, through a motion for reconsideration after the court had entered a judgment infected by these irregularities. But the right to appellate review has never depended on making a motion to reopen a final judgment.

3. Failure to Review the Record.—Compounding the procedural anomalies at the district court, the Court of Appeals simply refused to look at the core evidence in this dispute. This behavior drastically departed from established judicial conduct and the rule of other circuits. *See* Pet. 24-26. Respondents' excuse (Opp. 19-20)—that Petitioner waived its right to seek appellate review on the merits of the confiscation—has never been invoked by a Court of Appeals in any case (let alone a First Amendment case) to abdicate its responsibiilty to conduct actual appellate review. As explained in the Petition, the Court of Appeals had a duty under *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-86 (1964), "to make an independent examination of the whole record" in cases that implicate First Amendment issues. Respondents do not address or even cite *Sullivan*.[5]

* * * *

[5] Respondents' assertion that Petitioner opposed the Government's offer to present the bills to the Court of Appeals (Opp. 20) is simply a missatement of the proceedings below. Point I of Boggs' Brief cited this Court's opinion in *Sullivan* for the proposition that the Court of Appeals has an independent duty to review the whole record, and expressly requested a remand for the purpose of, at minimum, supplementation of the record. When Respondents proposed in their brief for Appellees that they could make a further *ex parte* submission to the appeals court, Petitioner noted that further proceedings *dehors* the record would be improper. And at oral argument, when the Respondents appeared with their "trove of confiscated art" (Pet. App. 13a), Petitioner expressly requested that the Court of Appeals look at the art and order the record supplemented. Petitioner followed with a written motion, which the court denied.

The prohibition on prior restraints is a matter of broad public interest, and the standards to be followed in forfeiture proceedings govern more than 2,000 cases per year in the federal courts alone. *See Judicial Business of the United States Courts: 1997 Report of the Director* at 132 (Table C-2A). Yet Respondents claim that this case is "unrelated to any generalized issue of national importance." Opp. 19. Perhaps this means that while there are many producers (artists and others) of erotic material, Boggs appears to be the only artist producing works of art that satirize and spoof money and that bear a resemblance to the currency—or at least the only one that the Treasury has gone after. Or perhaps it means that the procedural irregularities in this case were so bizarre that no other court will follow this case as a precedent.

Neither of those two notions detracts from the importance of granting certiorari here. Just as producers of erotic material charged with producing "obscenity" are entitled to a hearing to determine whether their material is within the constitutional bounds of what can be suppressed as being "obscenity," an artist producing works of art that bear a resemblance to the currency is entitled to a hearing as to whether his work can be suppressed under the counterfeiting statute, to the extent that it may be constitutionally applied. There was no hearing given Boggs either prior to or after the seizure of his works. The exemplars of his work chosen by the government for submission to the District Court were not identified to Boggs or his counsel; no government brief analyzing them one by one and arguing for their constitutional coverage by the statute was submitted, and Boggs had no opportunity to submit a contrary brief prior to decision; the Court's action was *ex parte*, without supporting findings, without any analysis work by work, and the exemplars examined by the Court in chambers were not

even put in the record. The grant of summary judgment to the Treasury under these circumstances was a travesty.

That departures so wide from the Federal Rules of Civil Procedure and the fundamental requirements of procedural due process are blessedly rare does not detract from the importance of this case, involving not only an extraordinary departure from procedural regularity but also the important question of the applicability of the rule announced in *Freedman* and applied uniformly in the intervening years. Moreover, the government's assertion (Opp. 10-11 n.5) that even if the works were *not* contraband, the doctrine of "sovereign immunity" precludes the courts from ordering their return, notwithstanding the First Amendment's protection of free speech and the Fifth Amendment's protection of private property, is so odious as to suggest that this case be taken to extirpate that notion, as well as to teach the proper scope of the *Freedman* case and to correct the gross departures from procedural due process sanctioned below.

CONCLUSION

For the foregoing reasons, and for the reasons stated in our Petition, the Petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 17, 1999

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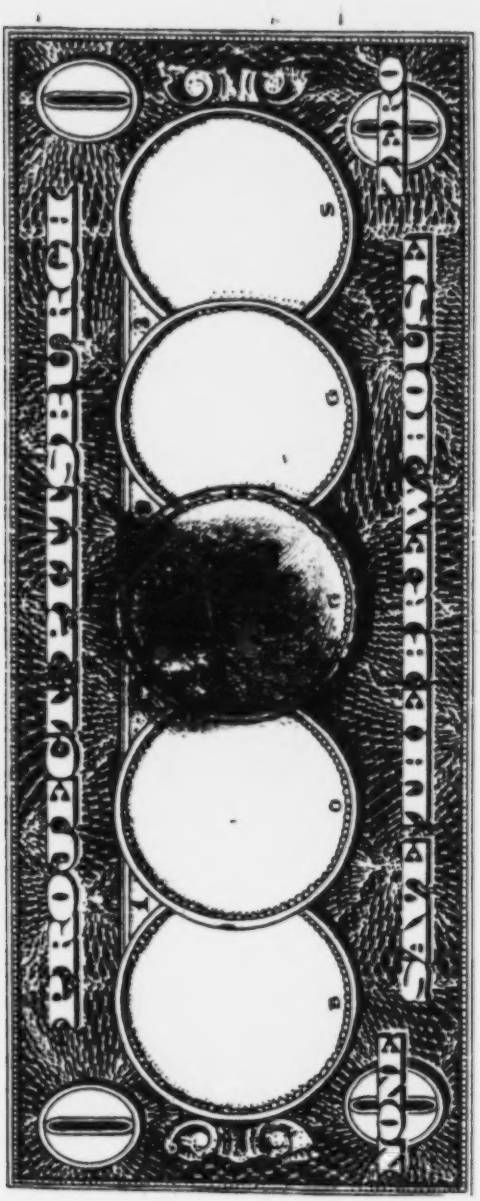
Five Silver Dollars (back), $5.00 Boggs-Bill #92/100, 1992. Mixed Media on Paper with artist's thumbprint, 66 mm x 156 mm (approx.)	4a

LIFE SIZE & IN COLOUR!

2a

FIVE
SILVER
United
States
CERTIFICATE
92/100
J.S.G. BOGGS - 1992


BRIQUEBOURG
NON SANS DROICT